MINUTES FOR THE BOARD OF ADJUSTMENT MEETING
May 31, 2013

I. **ATTENDANCE** - The Chair called the meeting to order at 1:00 p.m. in the Council Chambers, 200 East Main Street, May 31, 2013. Members present were Chair Barry Stumbo, James Griggs, Janice Meyer, and Joseph Smith. Absent were Thomas Glover, Kathryn Moore, and Noel White.

Swearing of Witnesses – Prior to sounding the agenda, the Chair asked all those persons present who would be speaking or offering testimony to stand, raise their right hand and be sworn. The oath was administered at this time.

II. **APPROVAL OF MINUTES** - The Chair announced that the minutes of the April 26, 2013 meeting would be considered at this time.

Action: A motion was made by Mr. Griggs, seconded by Ms. Meyer, and carried unanimously (Glover, Moore, and White absent) to approve the minutes of the April 26, 2013, meeting.

III. **PUBLIC HEARING ON ZONING APPEALS**

A. **Sounding The Agenda** - In order to expedite completion of agenda items, the Chair sounded the agenda in regard to any postponements, withdrawals, and items requiring no discussion.

1. Postponement or Withdrawal of any Scheduled Business Item - The Chair announced that any person having an appeal or other business before the Board may request postponement or withdrawal of such at this time.

a. **V-2013-31: MICHAEL D. CHILDERS** - appeals for a variance to reduce the required side yard from 8 feet to 4 feet in order to construct a detached garage in a Single Family Residential (R-1C) zone, at 435 Henry Clay Boulevard (Council District 5).

The Staff Recommends: **Approval**, for the following reasons:

a. Reducing the required side yard from 8' to 4', allowing a new detached garage to be constructed (where depicted on the site plan), should not adversely affect the public health, safety, or welfare, nor alter the character of the area. Several properties on this street currently have detached garages that are closer than 8' to the side lot line.
b. The unique situations that exist for this property are that this subdivision was developed in the 1920s & 1930s before the current Zoning Ordinance requirements. The existing detached garage currently encroaches into the side yard by about 2.5 feet, and the new garage will be in the same location, but about 1.5 feet wider. Granting the requested waiver will actually increase compatibility with surrounding properties.
c. The detached garage is in an area with an average 14' wide side yard; and, in no circumstance, will the proposed side yard be less than 4'. Furthermore, because the averaged side yard is greater than the actual requirement, there will be no resulting circumvention of the Zoning Ordinance.
d. Strict application of the Zoning Ordinance would result in a garage which will be more out of character for the neighborhood and would disallow the space that is needed by the property owner(s) to access their vehicle.
e. There is not a willful violation or other attempt to circumvent the requirements of the Zoning Ordinance by the appellant, as a building permit has been applied for and construction of the improvements has not yet begun.

This recommendation of approval is made subject to the following condition:

1. A building permit shall be obtained from the Division of Building Inspection, as depicted in the submitted application and site plan, prior to construction.

Staff Comment: Mr. Emmons stated that the staff had received a letter from the appellant, Michael Childers, requesting a one-month postponement of this item. He said that the appellant had submitted a revised application, and the staff had no objection to this request for postponement.

Mr. Stumbo asked if there were any citizens present who objected to this postponement request. There

were none.

Action: A motion was made by Ms. Meyer, seconded by Mr. Griggs, and carried unanimously (Glover, Moore, and White absent) to postpone **V-2013-31: MICHAEL CHILDERS** until the June 28 meeting.

2. No Discussion Items - The Chair asked if there were any other agenda items where no discussion is needed...that is, (a) The staff has recommended approval of the appeal and related plan(s), (b) The appellant concurs with the staff's recommendations. Appellant waives oral presentation, but may submit written evidence for the record, (c) No one present objects to the Board acting on the matter at this time without further discussion. For any such item, the Board would proceed to take action.

Note: Mr. Emmons noted that the required signs had been posted and proper notification mailed for each item on the agenda.

B. **Transcript or Witnesses** - The Chair will announce that any applicant or objector to any appeal before the Board is entitled to have a transcript of the meeting prepared at his expense and to have witnesses sworn.

C. **Variance Appeals** - As required by KRS 100.243, in the consideration of variance appeals before the granting or denying of any variance the Board must find:

That the granting of the variance will not adversely affect the public health, safety or welfare, will not alter the essential character of the general vicinity, will not cause a hazard or a nuisance to the public, and will not allow an unreasonable circumvention of the requirements of the zoning regulations. In making these findings, the Board shall consider whether:

(a) The requested variance arises from special circumstances which do not generally apply to land in the general vicinity, or in the same zone;
(b) The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land or would create an unnecessary hardship on the applicant; and
(c) The circumstances are the result of actions of the applicant taken subsequent to the adoption of the zoning regulation from which relief is sought.

The Board shall deny any request for a variance arising from circumstances that are the result of willful violations of the zoning regulation by the applicant subsequent to the adoption of the zoning regulations from which relief is sought.

1. **V-2013-32: BURLINGTON HEIGHTS CONDOMINIUMS, LLC** - appeals for two variances: 1) to reduce the width of the required zone-to-zone screening from 15 feet to 6 feet; and 2) to eliminate the 6-foot privacy fence requirement in favor of a mix of landscaping and 4 to 5-foot privacy panels along the rear of the patios in a High Density Apartment (R-4) zone, at 313 Burley Avenue (Council District 3).

   The Staff Recommends: **Approval**, for the following reasons:
   a. Granting the requested variances should not adversely affect the public health, safety or welfare, nor alter the character of the general vicinity, as the project is nearly surrounded by non-residential uses.
   b. The surrounding more intense non-residential land uses create a special circumstance that contributes to justifying the requested variances on the subject site.
   c. Strict application of the landscape requirements would force the appellant to construct a solid 6' tall fence or wall around this townhouse project, which may result in creating hidden pockets of space that would have a negative effect on the character and safety of the surrounding neighborhood.
   d. The applicant has provided alternative screening that will allow an effective buffer between the new townhouses and the surrounding properties, but with a desired level of openness.
   e. The project is currently under construction and the requested variances are more a result of negotiations with the surrounding landowners, and not a result of willful acts of the appellant.

   This recommendation of approval is made subject to the following conditions:
   1. The landscaping shall be installed in accordance with the submitted application and site plan, or as amended by the Planning Commission on the approved final development plan.
   2. All necessary permits shall be obtained from the Division of Building Inspection prior to installation.

   Staff Comment: Mr. Emmons stated that the staff had received letters from three adjoining property owners, all in support of this requested variance.

Representation: Mr. Rory Kahly, EA Partners, was present representing the appellant. The Chair asked him if he had read the staff report and the staff's recommendation, and if the appellant would agree to abide by the recommended conditions. Mr. Kahly replied affirmatively.

Action: A motion was made by Mr. Griggs, seconded by Mr. Smith, and carried unanimously (Glover, Moore, and White absent) to approve **V-2013-32: BURLINGTON HEIGHTS CONDOMINIUMS, LLC** - appeals for two variances: 1) to reduce the width of the required zone-to-zone screening from 15 feet to 6 feet; and 2) to eliminate the 6-foot privacy fence requirement in favor of a mix of landscaping and 4 to 5-foot privacy panels along the rear of the patios in a High Density Apartment (R-4) zone, at 313 Burley Avenue, for the reasons provided by the staff and subject to the two recommended conditions.

2. **V-2013-33: ELIZABETH and PRICE BELL** - appeal for a variance to reduce the required side yard from 8 feet to 6 feet in order to construct an addition to an existing residence in a Single Family Residential/Neighborhood Character Design Overlay (R-1C/ND-1) zone, at 319 Ridgeway Road (Council District 5).

The Staff Recommends: **Approval**, for the following reasons:

a. Reducing the required side yard from 8' to 6', allowing an addition and screened porch to be constructed nearer to the property line (where depicted on the site plan), should not adversely affect the public health, safety, or welfare, nor alter the character of the area, as most residences along Ridgeway Road have side yards that are as narrow (or more so) as that proposed for the subject property.
b. Most properties on this street do not meet the current side yard requirements, as this subdivision was developed in the 1920s & 1930s before the current Zoning Ordinance requirements were in place. Even granting the requested variance, this house will still have one of the larger side yard setbacks in the neighborhood, which constitutes a unique circumstance.
c. The addition is in an area with an average 6' wide side yard; and, in no circumstance, will the proposed side yard be less than 3'. Furthermore, the proposed addition is compliant with the Chevy Chase ND-1 zoning standards and is compatible with the neighborhood. Therefore, there will be no resulting circumvention of the Zoning Ordinance.
d. Strict application of the Zoning Ordinance would result in a smaller addition, which will not be of sufficient size to fill the need for the improvement by the appellants.
e. There is not a willful violation or other attempt to circumvent the requirements of the Zoning Ordinance by the appellants, as a building permit has been applied for and construction of the improvements has not yet begun.

This recommendation of approval is made subject to the following condition:

1. A building permit shall be obtained from the Division of Building Inspection, as depicted in the submitted application and site plan, prior to construction.

Representation: Ms. Elizabeth and Mr. Price Bell were present for their appeal. The Chair asked the appellants if they had read the staff report and their recommendation, and if the appellants would agree to abide by the recommended condition. The appellants replied affirmatively.

Action: A motion was made by Ms. Meyer, seconded by Mr. Griggs, and carried unanimously (Glover, Moore, and White absent) to approve **V-2013-33: ELIZABETH and PRICE BELL** – an appeal for a variance to reduce the required side yard from 8 feet to 6 feet in order to construct an addition to an existing residence in a Single Family Residential/Neighborhood Character Design Overlay (R-1C/ND-1) zone, at 319 Ridgeway Road, for the reasons provided by the staff and subject to the one condition recommended.

3. **V-2013-34: PHILLIP KENT** - appeals for a variance to reduce the required side yard from 3 feet to 0 feet in order to construct a 6-foot privacy fence in a Planned Neighborhood Residential (R-3) zone, at 2737 Mable Lane (Council District 2).

The Staff Recommends: **Approval**, for the following reasons:

a. Reducing the required side yard from 3' to 0', only for the purpose of allowing a portion of the fence to be constructed on the property line (where depicted on the site plan), should not adversely affect the public health, safety, or welfare, nor alter the character of the area.
b. The trapezoid-shaped configuration of the subject lot combined with the location of the home results in an

average 19' side yard, well in excess of the minimum 3' requirement, which constitutes a unique circumstance.

c. The location of the fencing is in an area with at least a 19' wide side yard; and, in no circumstance, will the proposed fence create a situation with an obstructed side yard of less than 6' on the subject or neighboring properties. Therefore, there will be no resulting circumvention of the Zoning Ordinance.
d. Strict application of the Zoning Ordinance would result in portions of the fence being relocated outside of the "required" side yard and would create a potential "no man's land" between the existing and new fences, which could become a maintenance nuisance for both the property owner and for the immediate neighbor, and which would result in a much smaller fenced yard for the appellant.
e. There is not a willful violation or other attempt to circumvent the requirements of the Zoning Ordinance by the appellant, as a fencing permit has been applied for and construction of the fence has not yet begun.

This recommendation of approval is made subject to the following condition:

1. A fencing permit shall be obtained from the Division of Building Inspection, as depicted in the submitted application and site plan, prior to construction.

Representation: Mr. Phillip Kent was present for his appeal. The Chair asked him if he had read the staff report and their recommendation, and if he would agree to abide by the recommended condition. The appellant replied affirmatively.

Action: A motion was made by Mr. Smith, seconded by Ms. Meyer, and carried unanimously (Glover, Moore, and White absent) to approve **V-2013-34: PHILLIP KENT** – an appeal for a variance to reduce the required side yard from 3 feet to 0 feet in order to construct a 6-foot privacy fence in a Planned Neighborhood Residential (R-3) zone, at 2737 Mable Lane, for the reasons provided by staff and subject to the one recommended condition.

4. **V-2013-35: PENNINGTON ASSOCIATES, LP** - appeals for two variances: 1) to reduce the required setback for two identification signs from 20 feet to 7 feet; and 2) to increase the allowable fence/wall height in the front yard from 4 feet to 8 feet in a Planned Neighborhood Residential (R-3) zone, at 205, 215 and 245 Codell Drive (Council District 7).

The Staff Recommends: **Approval**, for the following reasons:

a. Granting the requested variances will not adversely affect the subject or surrounding properties, nor will it affect the public health, safety, or welfare, as the proposed variances will not be in the sight triangle for this intersection. It will not alter the character of the vicinity or cause a nuisance to the public, as this site has long had signs in a similar location and an existing 6' tall decorative fence surrounding it.
b. Granting this variance will not allow an unreasonable circumvention of the Zoning Ordinance since it is promoting the redevelopment of this property in a way that is compatible with the existing development pattern of the established neighborhood. The requested variances are minor in nature and not contrary to the intent of the Zoning Ordinance requirements.
c. The subject property was developed prior to the adoption of the current Zoning Ordinance, particularly Articles 15-4(b) and 17-7(c)(2).
d. Strict adherence to the Zoning Ordinance would constitute a hardship to the appellant, because placing the signage at the required location would decrease its visibility and would require the removal of existing trees. Adding the embellishments of the columns, entry walls, and signage is an important factor of the total redevelopment of the apartment complex.
e. The requested variance is not the result of a willful violation of the Zoning Ordinance. When the applicant purchased the property, the signs, landscaping, and fences were all in place. The repair and upgrading of these features as a part of a major redevelopment of this site is reasonable.

This recommendation of approval is made subject to the following conditions:

1. The property shall be developed in accordance with this application and site plan.
2. All fence and sign permits shall be obtained from the Division of Building Inspection prior to their construction.

Representation: Mr. Joey Svec, Barrett Partners, was present representing the appellant. The Chair asked if the appellant had read the staff report and their recommendation, and if the appellant would agree to abide by the recommended conditions. Mr. Svec replied affirmatively.

Action: A motion was made by Mr. Griggs, seconded by Ms. Meyer, and carried unanimously (Glover, Moore, and White absent) to approve **V-2013-35: PENNINGTON ASSOCIATES, LP** - appeals for two variances: 1) to reduce the required setback for two identification signs from 20 feet to 7 feet; and 2) to increase the allowable fence/wall height in the front yard from 4 feet to 8 feet in a Planned Neighborhood Residential (R-3) zone, at 205, 215 and 245 Codell Drive, for the reasons provided by the staff and subject to the two recommended conditions.

D. **Conditional Use Appeals**

1. **CV-2013-30: BLUEGRASS MARLINS, INC.** - appeals for a conditional use permit for a community center; and a variance to reduce the required 25-foot setback from the floodplain to 0 feet in order to place a cover over an in-ground pool on a split-zoned property (Planned Neighborhood Residential/Planned Shopping Center [R-3/B-6P]), at 730 Millpond Road (Council District 9).

   The Staff Recommends: **Approval of the Conditional Use**, for the following reasons:
   a. Approving the requested conditional use will have a positive impact, allowing greater use of the neighborhood pool, which will provide for the maintenance of this neighborhood asset. This property is surrounded by the Willow Creek neighborhood park, owned by the Lexington-Fayette Urban County Government, which provides a buffer to the surrounding residential properties.
   b. All necessary utilities and services are existing and adequate to support this minor change in use.

   The Staff Recommends: **Approval of the Variance**, for the following reasons:
   a. Granting the requested variance should not adversely affect the subject or surrounding properties, as the pool was built on fill above the floodplain. The proposed structure will be built on the existing fill and will pose no threat to the public safety, health or welfare. Allowing the pool to be covered will not alter the essential character of the area.
   b. The proposed structures are not located in the regulatory floodplain; therefore, there will be no unreasonable circumvention of the Zoning Ordinance.
   c. The pool, and the fill on which it is built, were legally constructed prior to the adoption of the current regulation that requires all structures to be set back at least 25' from the floodplain. This is an unusual circumstance in this area of the community.
   d. Strict application of the Zoning Ordinance would create an unnecessary hardship for the applicant, since additional fill would need to be placed in the floodplain to meet the required 25' setback. Doing so would be detrimental to the floodplain and adjacent creek, which is owned by the LFUCG as the Willow Oak neighborhood park.
   e. The need for a variance is not the result of actions taken by the applicant, as the existing fill and floodplain were legally constructed before the adoption of the current floodplain regulations.

   This recommendation of approval is made subject to the following conditions:
   1. The property shall be developed in accordance with the approved application and site plan, or in accordance with the final development plan as approved by the Planning Commission.
   2. That all necessary permits, including a Zoning Compliance Permit and Building Permit, be obtained from the Divisions of Planning and Building Inspection prior to commencement of the community center use or erection of any structure.

   Staff Comment: Mr. Emmons noted that the staff had received four letters related to this request: three in support, and one in opposition. He distributed those letters to the Board members for their review.

   Representation: Mr. Roger Kehrt was present representing the appellant. The Chair asked if the appellant had read the staff report and their recommendation, and if the appellant would agree to abide by the recommended conditions. Mr. Kehrt replied affirmatively.

   Questions: Mr. Griggs said that one of the opposition letters concerned the possible negative impact of noise from the subject property on the nearby office building. Mr. Kehrt answered that he did not believe that noise would be an issue, as the street is heavily traveled by cars and pedestrians. He added that the office building is brick, and is located across the street from the subject property; so he feels that any noise from the subject property would be comparable to that from the nearby Kroger shopping center.

   Mr. Griggs asked how the pool on the property is currently used. Mr. Kehrt answered that it is typically used for

swimming by residents of the subdivision. Mr. Griggs opined that activities would likely be even quieter in the winter, when the pool is covered. Mr. Kehrt agreed that the cover should help to significantly reduce noise from the pool area.

Action: A motion was made by Ms. Meyer, seconded by Mr. Smith, and carried unanimously (Glover, Moore and White absent) to approve **CV-2013-30: BLUEGRASS MARLINS, INC.** – an appeal for a conditional use permit for a community center; and a variance to reduce the required 25-foot setback from the floodplain to 0 feet in order to place a cover over an in-ground pool on a split-zoned property (Planned Neighborhood Residential/Planned Shopping Center [R-3/B-6P]), at 730 Millpond Road, for the reasons provided by staff and subject to the two conditions recommended.

2. **C-2013-27: HIGHLANDS BAPTIST CHURCH** - appeals for a conditional use permit to construct a 3-bay detached garage for storage of church vehicles in an Agricultural Urban (A-U) zone, at 2032 Parallel Road (Council District 2).

The Staff Recommended: **Approval**, for the following reasons:

a. Granting the requested conditional use permit should not adversely affect the subject or surrounding properties. The site is well buffered to the north and east by an existing equine hospital, and an open space buffer along the adjoining residential area to the south will be maintained. Access to Georgetown Road will be facilitated by the existing signalized intersection at Parallel Road located near the church entrance.
b. All necessary public facilities and services are available and adequate for the proposed use.

This recommendation of approval is made subject to the following conditions:

1. The garage shall be completed in accordance with the submitted application and site plan.
2. All necessary permits, including a Zoning Compliance Permit and a Building Permit shall be obtained from the Divisions of Planning and Building Inspection prior to construction.
3. The parking lot will continue to be paved, with spaces delineated and landscaped/screened in accordance with Articles 16 and 18 of the Zoning Ordinance.
4. The final design of the parking lot and circulation shall be subject to review and approval by the Division of Traffic Engineering.
5. A storm water management plan shall be implemented in accordance with the requirements of the adopted Engineering Manuals, subject to acceptance by the Division of Engineering.
6. Any pole lighting for the parking lot shall be of a shoebox (or similar) design, with light shielded and directed downward to avoid disturbing surrounding properties.

Representation: Mr. Larry Chalin, Trustee, was present representing the appellant. The Chair asked if the appellant had read the staff report and their recommendation, and if the appellant would agree to abide by the recommended conditions. Mr. Chalin replied affirmatively.

Action: A motion was made by Mr. Griggs, seconded by Ms. Meyer, and carried unanimously (Glover, Moore, and White absent) to approve **C-2013-27: HIGHLANDS BAPTIST CHURCH** – an appeal for a conditional use permit to construct a 3-bay detached garage for storage of church vehicles in an Agricultural Urban (A-U) zone, at 2032 Parallel Road, for the reasons provided by staff and subject to the six recommended conditions.

3. **C-2013-29: BRYSON DANIEL DROZ** - appeals for a conditional use permit to establish an athletic club (personal training) facility in a Light Industrial (I-1) zone, at 441 Hayman Avenue, Suite C (Council District 3).

The Staff Recommends: **Approval**, for the following reasons:

a. Granting the requested conditional use permit should not adversely affect the subject or surrounding properties, as this site is well suited for a small fitness center, where the peak hours of operation will be in the early mornings and evenings after normal business hours, which will reduce the potential for lack of parking availability.
b. All necessary public facilities and services are available and adequate for the proposed use.

This recommendation of approval is made subject to the following conditions:

1. That the proposed athletic club facility (private gym) be operated in accordance with the submitted

application and site plan.

2. That the applicant obtain a Zoning Compliance Permit and Certificate of Occupancy from the Divisions of Planning and Building Inspection, respectively, prior to operating an athletic club facility at this location.

Representation: Mr. Bryson Droz was present for his appeal. The Chair asked if he had read the staff report and their recommendation, and if he would agree to abide by the recommended conditions. Mr. Droz replied affirmatively.

Action: A motion was made by Ms. Meyer, seconded by Mr. Griggs, and carried unanimously (Glover, Moore, and White absent) to approve **C-2013-29: BRYSON DANIEL DROZ** – an appeal for a conditional use permit to establish an athletic club (personal training) facility in a Light Industrial (I-1) zone, at 441 Hayman Avenue, Suite C, for the reasons provided by staff and subject to the two recommended conditions.

E. **Administrative Review**

1. **A-2013-28: LURADANE, LLC and ANDERSON HOMES FOR RENT** - an appeal of the Division of Planning's determination that two lots were consolidated into one by virtue of the previous existence of a residence in two separate locations, each in a Single Family Residential (R-1D) zone, at 1316 & 1318 Stanley Avenue and 1322 & 1324 Camden Place (Council District 3).

The Staff Recommends: **Disapproval**, for the following reasons:

a. The lots in question are not non-conforming lots (as defined in Article 4-1(c)), but do meet the minimum requirements of Article 8-8(o)(1)(c) of the Zoning Ordinance. As of December 5, 2002, lots that are the subject of this appeal were occupied by 1) single family detached dwellings, 2) located in the defined Infill & Redevelopment area, and 3) involved single properties, as identified by their individual deeds.
b. Well into the 1970s, building officials commonly allowed buildings to be built over lot lines despite laws requiring building setbacks from property lines, and building codes that had strict application of structural building requirements associated with such property lines. These officials permitted this type of construction by ruling that the combined effect of allowing the construction and the subsequent transfer of such lots created a de facto "consolidation" of the properties. In the opinion of the times, these actions resolved all strict violations of zoning ordinances and building code requirements that would have otherwise been created by building structures across otherwise platted lot lines.
c. After homes were originally constructed on the subject lots decades ago, these properties were transferred numerous times, each as an individual property. They were taxed as a single unified property by the Property Valuation Administrator for decades.
d. Approval of this appeal has the potential to allow the wholesale razing of homes and allow multiple homes to be constructed, by-right, in numerous neighborhoods where individual homes have existed for decades. Such a result would create chaos and neighborhood instability at unimaginable levels. This would also contradict the intent of the "Infill and Redevelopment" text amendments (to the Zoning Ordinance) that have been adopted over the past decade to promote compatible and appropriate infill development.

Staff Presentation: Mr. Sallee began his presentation of the staff report on this appealby noting that the staff had distributed several exhibits to the Board members prior to the start of the meeting. He said that the first staff exhibit was a map identifying the two subject properties, which are located at the end of Camden Place and Stanley Avenue, very near the end of American Avenue, in the vicinity of Man O' War Place and Waller Avenue. Displaying photographs of the properties, Mr. Sallee noted that they are also located immediately west of the main Norfolk-Southern (north-south) rail line through the community. The University of Kentucky is located just a short distance across the railroad tracks to the east.

Mr. Sallee stated that the appellant wishes to construct four single-family detached houses on the subject properties, which are currently zoned R-1D. The R-1D zone is a single-family residential zone, generally requiring a minimum lot size of 6,000 square feet; one of the provisions of the R-1D zone is that only one detached dwelling can be constructed on each lot.

Mr. Sallee displayed the following photographs of the subject properties: 1) a view from the east, noting the parking lot which serves office buildings on Waller Avenue, the railroad, and the utility substation located directly across American Avenue; 2) a closer view of the property on Stanley Avenue, noting evidence of a former residence on the property; 3) a view of the Camden Place property. He noted that all of these

oblique aerial photographs were taken in 2010.

Mr. Sallee stated that the staff also intended to display some older photographs of the subject property, since the property's history is central to this appeal. He displayed 1976 photographs of each of the properties, noting that they depicted single-family residences on both of the properties. Displaying a more recent aerial photograph, Mr. Sallee stated that it, too, depicted single-family dwellings on both of the lots.

Mr. Sallee displayed a zoning map from 1969, explaining that the subject properties were in a Two Family Residential (R-2) zone at that time, and they held that zoning designation until the late 1960s. Displaying a zoning map from around 1990, he said that, by that time, both of the properties were zoned R-1D. The 2010 zoning map depicts the existing conditions on the properties; the Camden Place property contains a single-family dwelling and an accessory structure, while the Stanley Avenue property is mostly vacant, although it had an accessory structure in the rear of that property.

Mr. Sallee stated that the central matter in this appeal, from the staff's perspective, is the historical actions that involve the subject properties, and whether they should be considered as two or four properties, as the appellant contends. He said that, into the 1970s, local building officials would routinely allow properties to be developed such that buildings were allowed to cross platted lot lines. The area around the subject properties was platted prior to the existence of a Planning Commission, in a series of mostly 25' lots. Purchasers would then have an option as to how many properties they wished to purchase, and they could construct the structures over the multiple lots. Mr. Sallee noted that this type of development was not unique to residential zones, as there were also existing commercial zones that were developed in this fashion, particularly in the New Circle Road corridor. He stated that, at that time, it was considered by officials that that action had the effect of combining the properties. By the action of a property owner purchasing multiple tracts, it was determined that no variances or zone changes were necessary in order for the tracts to be considered as unsubdivided parcels for building purposes. Mr. Sallee noted that this practice continued up until the 1970s.

Mr. Sallee stated that, since the inception of the R-1D zone in 1969, one of its provisions has been that single lots cannot contain more than one dwelling. He said that the lots in question are not non-conforming lots; they meet the "small lot" requirements of the Zoning Ordinance. Referring to the relevant portion of Articles 4 and 8 of the Zoning Ordinance, which was included with the staff's exhibits, he noted that non-conforming lots are defined in the Ordinance and they "do not include those which are in the defined Infill & Redevelopment Area that are smaller than the required lot size of the zone, provided they meet the requirements of the small-lot provisions contained in the Zoning Ordinance." Those provisions, also included in the staff's exhibits, denote that, in order to implement a directive of the Comprehensive Plan to promote development and redevelopment in the Infill & Redevelopment Area (generally, the ten square miles most central to the community), new lot, yard, and height requirements were adopted in 2002 for lots that were less than 60 feet wide. In addition, a set of standards exists for lots that are 50 feet in width or greater, which apply to the subject properties.

Mr. Sallee said that the staff provided the PVA information for the subject properties as part of their packet of exhibits, in order to document that single family dwellings were located there. The PVA record for the Camden Place property indicates that, in 1957, 2005, and 2009, the documented property transfers were for a single property. In 2012, a new entry was made for the subject property, with the same legal description, but a new Camden Place address. Mr. Sallee stated that the Stanley Avenue property had a similar history, with fewer transfers. It was transferred in 1974 as a single property, but, in 2012, a new entry was made, with the same legal description, and a new Stanley Avenue address. Mr. Sallee emphasized that, historically, from the time the dwellings were constructed, they were on one piece of property that had been taxed and transferred that way for decades. The staff contends that this information clearly demonstrates that these properties did exist in 2002; they were occupied by single-family detached dwellings; and they involved single properties, as accounted for in their individual deeds. Mr. Sallee said that the staff believes, therefore, that they meet the "small-lot provisions" of the R-1D zone for infill lots.

Mr. Sallee displayed a drawing of a proposed road closure in the area of the parking lot, a photograph of which he displayed earlier in his presentation. He said that the exhibit showed that adjacent to the parking lot was a 20' alleyway and approximately 50' wide, single piece of property, which serves as further proof that other entities recognized that property as one parcel.

Mr. Sallee stated that the Zoning Administrator who made the decision that was being appealed at this hearing determined that the I/R regulations in the Zoning Ordinance were not intended to allow razing of homes, and the construction of additional new homes "by-right" on those properties. He displayed a map of other subdivisions that were platted narrowly, and property transfers often done either in single lots or collections of multiple lots, similarly to the area around and including the subject properties.

Referring again to the staff's exhibits, Mr. Sallee explained that they also included a copy of a 2003 staff report allowing a new type of minor subdivision plat. He read the following from that report:

> "Many deeds describe land which has been problematic for Building Inspection, and where they had required consolidation plats prior to permitting."

Mr. Sallee stated that that particular amendment to the Land Subdivision Regulations was intended to alleviate that problem, and it recognized that, without parcel boundaries changing, only technical information was needed to recognize the fact that the properties had transferred prior to the 1960s in a fashion that did not match their original lotting pattern. He said that the staff report also indicated that that type of plan would allow a simplified process, in order to help non-profit builders with title problems and alleviate delays, and he read the following from that report:

> "This minor plat category was intended to help describe tracts that had consistently been described as 'pieces and parts' of former subdivision lots."

Mr. Sallee said that staff exhibit #10 demonstrated that the I/R regulations were intended to help facilitate housing development in the ten central square miles of the community. There have been two rounds of text amendments to accomplish that goal; exhibit #11 contains the Planning Commission minutes where those text amendments were considered. Mr. Sallee stated that those minutes include language indicating that the text amendments were intended to "make fair cost-effective development; allow collaboration in development decisions; and to ensure neighborhood compatibility with Infill & Redevelopment." He noted that the staff was certain that those text amendments have spared the Board of Adjustment from numerous applications for dimensional variances over the past decade.

Mr. Sallee stated that the staff believes that the appellants have other means available to them to develop the two subject properties for four single-family detached homes. For instance, he said they could ask for a zoning category that would permit lots as small as 25 feet in width, which would allow each lot to have its own single-family dwelling.

Mr. Sallee concluded the staff's report by saying that the staff is recommending disapproval of this request, for the four reasons as listed in the staff report and on the agenda.

Petitioner Representation: Mr. Murphy stated that he was present today representing both Luradane LLC, and Anderson Homes for Rent. He distributed an exhibit packet to the Board members, to which he would refer throughout his presentation.

Mr. Murphy said that he was already working on this case with Luradane LLC, when a similar case was brought to his attention by a representative of Anderson Homes for Rent. He said he determined at that point that it would be appropriate to combine the two cases, noting that Luradane LLC owns the two lots on Stanley Avenue, and Anderson Homes for Rent owns the two lots on Camden Place.

Mr. Murphy displayed the original plat for the neighborhood on the overhead projector, noting that the property was originally platted as Parish Subdivision in 1921, and that that plat has never been amended. Mr. Murphy said that the Stanley Avenue lots are each 25 feet wide and approximately 130 feet deep. Of the two Camden Place lots, Lot 72 is 25 feet wide; Lot 71 is slightly wider, because it is angled, and both of those lots are approximately 130 feet deep as well. Mr. Murphy stated that all four of the lots currently meet the small-lot provisions of the Zoning Ordinance.

Mr. Murphy also noted on the plat the location of the pathway which was closed next to Lot 104, to which Mr. Sallee referred in his presentation. He said that the petitioner contends that the closure of that pathway does not pertain to any of the properties which are the subject of this appeal, since it was located next to

Lot 104.

Mr. Murphy said that the petitioner does not agree with the staff's assertion that, because the lots had been included in a single deed at some point, they were merged together. He stated that, as part of legal doctrine, one deed can convey multiple lots, but that action does not merge the lots. Rather, lots are typically conveyed in one deed in order to pay only one recording fee. Mr. Murphy noted that his exhibit booklet contained each of the deeds for the properties, all of which were deeded separately and recorded as separate lots by the Fayette County Clerk. He also referred to the exhibit book for the PVA records for each of the four properties, noting that, at one time, a house was constructed over the property line between Lots 71 and 72 on Stanley Avenue. The petitioner does not agree with the staff's contention, however, that the two lots should be considered as a single lot because of that house, which no longer exists. Mr. Murphy said that, once PVA was informed that the house no longer existed, the properties were listed with two tax accounts, one for each lot. He noted that the Camden Place lots were treated similarly by PVA.

Mr. Murphy said that he had worked with John Strom, attorney, who examined the titles for all four subject properties. Mr. Strom checked every deed, from 1921 to the present, and every deed referred to the properties as separate lots, although they did not include metes and bounds descriptions. Mr. Murphy noted that his exhibit packet included an affidavit from Mr. Strom, certifying that title work.

Mr. Murphy next referred to the exhibit book for the builders' plans for each of the four subject properties, noting that he used them to illustrate that each property could meet all of the small lot provisions, and each property could accommodate one single-family dwelling. He displayed a photograph of an existing home in the neighborhood, which was constructed by Anderson Communities on a 25-foot lot, noting that the four proposed structures would look very similar. Three of those structures are proposed to be rental units, while the fourth would be owned by a neighborhood homeowner who traded her lot to Anderson Communities for a new home.

Mr. Murphy stated that the staff report noted that, if this appeal is granted, it could result in "chaos." He said that the petitioner strongly objects to that assertion. At the time of the drafting of the small lot provisions, Mr. Murphy was working with Faith Community Housing, a faith-based corporation that worked to construct affordable housing for low-income families. He said that one of that organization's primary difficulties was that, on many of the vacant lots they located, the rule was applied that older small lots could only have one dwelling constructed on them if a structure had ever been built across the property line. Everyone involved in working with Faith Community Housing welcomed the drafting of the small lot provisions, because they allowed the construction of a dwelling unit on each small lot that met the requirements, even if it had had a structure constructed across the property line. Mr. Murphy said that he did not make any comments on the draft at that time, because he believed that the new Ordinance "meant what it said;" he now believes that the staff is advocating a position that is "180 degrees different" from what the Ordinance states.

Mr. Murphy said that the petitioner contends that their proposal to construct four structures on the subject properties falls directly in line with the community's emphasis on maintaining the existing Urban Service Area boundary and "building up, not out." He read the following excerpts from the 2007 Comprehensive Plan:

> "Encourage Infill & Redevelopment in locations where adequate urban services and infrastructures are in place or planned."
>
> "Provide housing opportunities to meet the needs of all citizens."
>
> "Provide land for residential uses of all types, in sufficient amounts and locations within the Urban Service Area, to adequately meet the projected population growth of Fayette County."

He read the following, from the Goals & Objectives of the 2013 Comprehensive Plan:

> "Plan for housing that addresses the market needs for all of Lexington-Fayette County's residents, including, but not limited to, mixed-use and housing near employment and commercial areas."

> "Support Infill & Redevelopment throughout the Urban Service Area as a strategic component of growth."

Mr. Murphy stated that the neighborhood surrounding the subject properties is in transition, due in large part to its proximity to the University of Kentucky (UK). Referring to a copy of the University's Master Plan, he stated that UK eventually intends to extend the campus all the way to the railroad tracks, which are very near the subject properties. Many UK students now live in the neighborhood, although there are still a few owner-occupiers. In addition, since the university removed a large amount of housing in order to construct some of its recent expansions, those students have been forced to locate housing in other areas near the campus. Mr. Murphy stated that those trends have altered the character of the area significantly. He displayed a rendering of the neighborhood, noting that Stanley Avenue is currently entirely non-owner occupied; on Camden Place, only six homes out of 19 are owner-occupied. The petitioner contends, therefore, that the construction of four dwelling units on the subject properties would not be at all out of character with the surrounding area.

Mr. Murphy stated that the petitioner contends that the four subject properties fully comply with the small lot provisions of the R-1D zone. He read the following from the Zoning Ordinance:

> "Non-conforming lots do not include those within the defined Infill & Redevelopment areas, that may be smaller than the required lot size of the zone, provided those lots meet the requirements of the small lot provisions contained in each residential zoning category."

He said that the petitioner believes that, since the four lots comply with those provisions, they should be entitled to a building permit. The staff is likely to contend, Mr. Murphy believes that, in order to comply with the provisions, the lots must have been created as of December 5, 2002. Mr. Murphy stated that the 2009 addition to the Zoning Ordinance refers to an "administrative shortcut" that allowed houses to encroach over property lines. He explained that, during a real estate closing for a house that encroaches over a property line, the buyer is typically given three options: 1) obtain an encroachment permit from the owner of the adjoining property; 2) purchase the adjoining lot; or 3) tear down the portion of the house that encroaches over the property line. Mr. Murphy emphasized that, in this case, there is no longer an encroachment, since the structures on the subject property have been demolished. He added that, prior to 2009, there was never an Ordinance in effect in Lexington-Fayette County that stated that the existence of a house on a property line meant that the two properties were considered to be consolidated.

Referring to a copy of the Ordinance included in his exhibit packet, Mr. Murphy stated that the Ordinance noted three conditions that could result in the properties being considered two separate parcels: 1) if two or more lots have ever had a structure built over the property line in a residential zone; 2) if the lots are considered to be conforming, except for non-conforming lots that comply with the small-lot provisions in each zone. He read the following from the Ordinance:

> "A lot that does not meet the size requirements for the zone in which it is located may still be developed according to the special provisions for small lots, contained in each residential zoning category."

Mr. Murphy stated that, the way the Ordinance is written, it "cures the problem" of how to handle lots such as the subject properties. He said that the only way that a lot could be disqualified from this regulation is if a structure was built over a property line on a lot that is non-conforming and does not comply with the small-lot provisions of the zone in which the lot is located.

Mr. Murphy said that administrative shortcuts are not statutes, and they are not considered to be law. He explained that, when Governor Beshear was Attorney General of Kentucky in 1983, he rendered two opinions on cases from communities that had adopted planning and zoning regulations. In each of those cases, a property was platted prior to the adoption of zoning regulations. The staff in those cases did not want to honor the old plats, but the Attorney General ruled that the plats must be honored. Referring to the two plats, included in his exhibit packet, Mr. Murphy said that, in one case, the ruling noted that zoning has prospective effect only, and was not retroactive. He read the following, from *Lampton v. Paneer*, which first determined that developers must construct appropriate infrastructure along with their projects:

> "We have no quarrel with the general proposition that zoning changes as to lot size, which occur after a subdivision plat is recorded and approved, and development begun, should not be allowed to interfere with the development of the property according to the original plat."

He read the following, from the other attorney general opinion, which also referred to *Lampton v. Paneer*:

> "Further, a retroactive operation will not be given a statute interfering with antecedent rights, unless such is the manifest intention of the legislature, or unless the statute clearly contains a declaration of retroactivity."

Mr. Murphy stated that *Hamner v. Best* dealt with the handling of cases where there was some ambiguity in the ordinance. He read the following from that case:

> "Zoning resolutions are in derogation of the common law, and deprive a property owner of certain uses of his land, and, as such, must be strictly construed. Any restrictions contained in zoning regulations may not be extended by the courts to include limitations not clearly prescribed."

Mr. Murphy said that the petitioners contend that, in this case, the limitations on the use of their property are not clearly prescribed in the Zoning Ordinance. He explained that the courts have also ruled that any ambiguities must be resolved in favor of the landowners' use of their property. The petitioners do not agree with the staff's assertion that allowing the subject properties to be subdivided could create a precedent that could be detrimental to other neighborhoods. In historic districts, there are often inherent restrictions that protect the neighborhood from development that would be out of character, and the Infill & Redevelopment Ordinances are under continuous review by the staff. Mr. Murphy said that, if the staff believes that the provision that allows this property subdivision is wrong, they have the ability to request that the Ordinances be changed. Mr. Murphy stated that he and his clients believe that the Zoning Ordinance clearly allows them to subdivide their properties as proposed, and they believe that it will allow them to construct a type of housing that is consistent with the rest of the neighborhood.

Petitioner Question: Mr. Murphy asked if the petitioners would be able to construct one house on each of the four subject lots, had there never been a house constructed across the property lines. Mr. Sallee answered that the Special Provisions listed in the Zoning Ordinance are for 1) single-family detached dwellings; 2) in the defined Infill & Redevelopment areas; and 3) as they existed on lots as of December 5, 2002. He said that, in the instance Mr. Murphy was referencing, no structure was ever constructed, so there was no existing single-family detached dwelling as of that date. Mr. Murphy asked again if the petitioners could have obtained a building permit, had there never been a house constructed across the property lines. Mr. Sallee responded that he could not answer that question, as the Division of Planning does not issue building permits. Mr. Murphy stated that the Division of Planning does issue opinions as to whether a building permit should be approved; he then asked if the Planning staff would have issued an opinion indicating that a building permit could be approved, had there never been a house constructed across the property lines on each of the subject lots. Mr. Sallee responded that he was not sure that the Division of Building Inspection would have issued two building permits on the lots as they existed as of that date, since there was only one deed for the property. He added that they might have required a subdivision plat or some other instrument in order to subdivide the property. Mr. Murphy opined that, if the subject properties had been under separate ownership for the past 92 years, they would have been able to get individual building permits. Mr. Sallee agreed with that assessment.

Mr. Murphy said that the staff agrees that there is a circumstance under which an individual building permit could be issued for each lot; if there were four owners for the four lots, the permits could be issued. He stated that he was told that the only reason the petitioners could not get building permits for the properties was that a house had been built over the property line. He opined that it "would not cause chaos in the neighborhood" to go from one allowable house to two, when, in certain circumstances, the petitioner would have been allowed to go from zero houses to two.

Mr. Murphy stated that the petitioners believe that the proposed dwelling units would be consistent with the character of the neighborhood, and that the proposal is in agreement with the recommendations of the

Comprehensive Plan. He said that any one of the findings provided in his exhibit packet would be sufficient to support an action of approval for this appeal. Mr. Murphy reiterated that statutes have declared that, if any ambiguity exists in the law, it has to be resolved in favor of the property. He said that the 1923 plat for the subject properties is the plat of record today, and he and the petitioners feel very strongly that those pre-existing plats must be respected as filed, as outlined in the previously quoted Attorney General's opinion.

Board Questions: Mr. Griggs stated that the PVA records for the 25-foot lots indicate that 1322 and 1324 Camden Place appear to have the same legal description, in that they are both described as Lots 71 and 72. He said that the other pair of lots is listed similarly, and asked if those listings were correct. Mr. Murphy referred to his exhibit packet, noting that the account for each lot is listed correctly as a separate lot. He said that the legal description for those PVA entries is actually listed in the space typically allotted for plat cabinet and slide information.

Mr. Griggs asked who advised the appellants to proceed with the new deeds prior to getting an opinion on whether or not they would be able to obtain building permits. Mr. Murphy responded that he had discussed that issue with Mr. Strom. Mr. Griggs asked why the appellants got so far into the process without obtaining an opinion from anyone at LFUCG. Mr. Murphy answered that the appellants were reluctant to do so, because they knew that it would be difficult to divide the properties as they wished since they were listed on one tax account, with one deed. He added that no permits were requested, and no construction was begun, without going through all of the proper channels. The appellants felt that, if the PVA would not separate the properties into two accounts, there would be no reason to expend the resources to consult with the Planning staff about the issue.

Mr. Griggs asked Mr. Murphy to explain why his interpretation of the Zoning Ordinance should be considered "stronger" than the staff's, since he was somewhat confused about the distinctions between the two opinions. Mr. Murphy answered that the staff's issue is with the Special Provisions of the R-1D zone, which apply to a lot that existed as of December 5, 2002. He said that the subject lots have existed since they were platted in 1921, and the petitioners are entitled to use them. He said that the Attorney General indicated that plats that were recorded before planning and zoning regulations must be honored, even if they are contrary to current restrictions. In addition, there was no mention in the Ordinance at that point in 2002 about structures constructed over property lines. There were no regulations concerning that issue at all; rather, it was treated as an "administrative shortcut." In 2009, the Urban County Council amended the Ordinance to address houses constructed over property lines. That Ordinance indicated that, if a house was ever built over a property line, the property owner can build on each individual lot, unless the lot is non-conforming and does not comply with the small lot provisions of the zone. Mr. Murphy said that, even if the Board believes that the lots did not exist as of 2002, they must recognize that having a house constructed over the property line is the controlling factor in this situation.

Staff Rebuttal: Mr. Sallee displayed the staff exhibit side-by-side with Mr. Murphy's exhibit, stated that one of the key issues with this decision is which set of provisions under the Infill & Redevelopment regulations are applicable for the two properties that the Board is reviewing. He said that Mr. Murphy maintains that the provisions of Article 8-8(o)(1)(a) is applicable, while the staff maintains that item Article 8-8(o)(1)(c) is the applicable regulation. Mr. Sallee explained that the staff viewed each of the two subject properties as an existing lot with 50 or more feet of frontage as of 2002. That specific set of requirements, therefore, should apply to both properties, and not the requirements for lots with 24 to 35 feet of frontage as of that date. Those regulations were put in place for single-family detached dwellings within the central 10-square-mile area of the community, and they were designed to create a balance between two competing interests: the need to redevelop vacant properties by lessening most of the yard requirements for the smaller lots in those areas; while at the same time ensuring that stability was maintained in neighborhoods, and preventing the loss of neighborhood character. Mr. Sallee stated that, in reviewing both sets of restrictions, there is no mention of lot size in either subsection "a" or "c."

Mr. Sallee referred to page 34 of Mr. Murphy's exhibit, stating that the staff's position is not inconsistent with the Attorney General's opinion. He said that there were no changes made to the lot size requirements in 2002, under section "a" or section "c." Secondly, there was no interference with the development of the properties as covered under those two sections; in fact, those 2002 regulations assisted the potential development of the properties. Therefore, the staff maintains that their position is not contrary to the Attorney General's provisions.

Mr. Sallee stated that Mr. Murphy and the staff had both submitted Article 4-1 as exhibits. He said that the title of Article 4-1 is "Non-conforming Lots," and the title of Article 4-5 is "The Regulation of Non-conforming Lots." He said that it is the staff's position that the subject properties are not non-conforming lots. If there were any existing non-conformities with them, they were greatly relieved with the text amendment that was adopted in 2002, including the lot frontage provisions. Mr. Sallee reiterated that the staff believes that these Article 4 provisions are applicable only to non-conforming lots, and the subject lots meet all of the Article 8 provisions.

Discussion: Mr. Griggs asked if this type of subdivision of a lot that had a house constructed over the property line had been accomplished before, and he requested that Mr. Sallee address the "chaos' to which the staff report referred. Mr. Sallee answered that that paragraph in the staff report echoed the staff's strong recommendation on this appeal. He said that what is consistent in the timeline that had been presented to the Board was that the history of the properties has never involved an action by the Board of Adjustment or the Planning Commission, so all of the actions have been done by constructing and demolishing houses, and transferring property. Mr. Sallee explained that the staff concluded their report by noting that there are other remedies for the appellants, if they wish to build four houses on the property, which is the primary difference of opinion in this case. He added that the staff has no issue with the type of house proposed, rather the number of houses on the subject properties. In addition, the staff noted in their report that Section 1-5 of the Ordinance states that, if regulations are deemed to be in conflict, the more restrictive applies. Mr. Sallee stated that that was the position that the Zoning Administrator took in making this determination. With regard to Mr. Griggs' first question, he said that there have been subdivision plats approved in the Infill & Redevelopment area, but he was not sure if there had been any in this particular zone. Mr. Griggs asked if any such subdivisions had occurred by-right, as the appellants are suggesting should be allowed. Mr. Sallee answered that, until recently, the Planning staff was not involved with zoning enforcement, and rarely has the staff been involved with the issuance of single building permits, so he did not have the necessary background to answer that question.

Petitioner Rebuttal: Mr. Murphy read the following, from the Attorney General opinion which he presented in his exhibit, and to which Mr. Sallee referred:

> "Zoning ordinances which occurred after a subdivision plat is recorded, and development begun, should not be allowed to interfere with the development of the property, according to the original plat."

He said that the original 1921 plat for the subject property still stands. Mr. Murphy added that the staff does not believe that Article 4-5(c) does not apply in this instance, which he maintains is not the case, as there was no consolidation of the subject properties. He said that, if the staff's position was correct, Article 4-5(c), which was enacted specifically to deal with situations such as this, would never apply. Under the staff's interpretation, any time a house is built over the property line, the properties are consolidated.

Discussion: Mr. Griggs asked Mr. Sallee to respond to Mr. Murphy's last statement. Mr. Sallee stated that the staff was not sure that Article 4-5(c) was meant to apply any time that a house had been built over a property line. He said that that section deals with non-conforming lots, and not every situation where a house was built over a property line is a non-conforming lot. Mr. Murphy stated that, under the law, section titles of ordinances are not part of the ordinance; they are put in for convenience; the wording of the ordinance must be followed. Mr. Sallee displayed the text in question on the overhead projector, noting that it states "Non-conforming lots shall be permitted to continue, and shall be regulated as follows." Mr. Murphy stated that the staff was asserting that Article 4-5 does not apply because the lot is not non-conforming; if the lot is not non-conforming, he believes that the petitioner is entitled to get building permits. He added that, if the lot is non-conforming, then Article 4-5 applies, and the petitioners are entitled to building permits because the lots meet the infill requirements for 25-foot lots.

Mr. Stumbo asked if four different individuals owned the four lots, they would be able to construct a single-family dwelling on each lot. Mr. Sallee answered if each lot had separate ownership, and no homes on them, he did not believe they could be prevented from constructing a structure on each lot. He added that, even before the Infill & Redevelopment ordinances were passed in 2002, a non-conforming lot could have a structure built on it.

Mr. Murphy stated that he agreed with Mr. Sallee's last statement, and said that the properties exist today as four separate, vacant lots. He said that, if the lots were under individual ownership, they could construct four homes there, and the appellants are requesting to be able to construct four homes there, since they believe they comply with the Zoning Ordinance.

Mr. Griggs stated that he was uncomfortable with the paragraph in the staff report that states that approval of this request could create chaos in neighborhoods, particularly with the number of similarly-zoned areas around the city. He said that, for that reason, he would be making a motion to disapprove this request.

Motion: A motion was made by Mr. Griggs to disapprove **A-2013-28: LURADANE, LLC and ANDERSON HOMES FOR RENT, LLC**, based on the staff's findings for disapproval. Mr. Griggs' motion died for lack of a second.

Motion: Ms. Meyers stated, "Based upon the evidence presented in the hearing held, this Board moves to approve the appeal in **A-2013-28: LURADANE, LLC and ANDERSON HOMES FOR RENT, LLC**, for the following reasons:

1. These lots were platted in 1921, prior to zoning regulations, and the four lots in question are at least 25 feet wide.
2. Although a house was constructed over the lot lines between Lots 107 and 108, and also on Lots 71 and 72, apparently in violation of regulations requiring side yard setbacks, in each of these cases, the house has been removed. There is no provision in the Zoning Ordinance that states that, in the Infill & Redevelopment area, lots are somehow consolidated has been built which encroaches a side yard line. If two or more lots have ever had a structure built over the property line, and if any of the lots are non-conforming, the land shall be considered to be an undivided parcel, except those complying with the small-lot provisions of each zone. This Ordinance does not apply to these properties because the lots all comply with the small-lot provisions of each zone.
3. In the past, two lots have been conveyed in the same recorded deed. However, in all such deeds, reference was made to two lots, instead of a metes and bounds description of one lot. The fact that two lots are mentioned in the same deed does not serve to consolidate two lots into one lot. At the present time, all four lots are contained in four separate deeds, and each of the four lots has its own account with the PVA (Property Valuation Administrator).
4. Granting building permits for each of these four lots will encourage greater density inside the Urban Service Area to reduce pressure on expansion of the Urban Service Area Boundary and to promote Infill & Redevelopment."

Action: Ms. Meyers' motion carried, 3-1 (Griggs opposed; Glover, Moore, and White absent).

2. **A-2013-26: BOONE CREEK ADVENTURES** - an appeal of a Notice of Violation (NOV) issued by the Division of Planning on March 8, 2013 for a property in the Agricultural Rural (A-R) zone, at 8291 Old Richmond Road (Council District 12).

Apellant Request for Postponement: John Park, attorney, was present representing the appellant. He said that, earlier in this meeting, Mr. Stumbo had inadvertently referred to the appellant as "Boone Creek Adventures," but that is a separate company, and the appellant is actually Boone Creek Properties. Mr. Park said that the appellant would like to request a postponement of this appeal in order to file an application to amend their conditional use permit. He said that, in the Notice of Violation, the Division of Planning indicated that Boone Creek Properties could not submit an application to amend its conditional use permit unless a separate entity, Boone Creek Adventures, agreed to dismiss its appeal of the prior decision to deny that entity a permit. The appellant does not believe that is appropriate, since: 1) Boone Creek Adventures is a separate company; 2) that was a much larger project, involving another family; and 3) Boone Creek Properties has the right to request an amendment of its existing conditional use permit. Mr. Park concluded by noting that the appellant was fully prepared to go forward with this hearing today, but the appellant would like to have the opportunity to amend the permit.

Chairman Comment: Mr. Stumbo said that all parties appeared to be prepared to go forward, and he asked the Board if they would prefer to proceed at this time.

Action: A motion was made by Ms. Meyer, seconded by Mr. Smith, and carried 4-0 to proceed with the hearing at this time.

Chairman Comments: Mr. Stumbo reminded the participants that this item is an administrative appeal, not a rehearing or revision of the request for a conditional use permit that was denied in January of 2012. He said that the purpose of this appeal is to determine whether or not the Division of Planning was correct in issuing a Notice of Violation regarding the property at 8291 Old Richmond Road in order to enforce the current zoning regulations. Mr. Stumbo added that, as the presiding officer, he intends to limit or exclude testimony that is repetitious or not germane to this issue.

Mr. Stumbo said that he received a letter from the appellant's attorney, John Park, who expressed deep concern about a pre-judgment bias displayed by Board member Jim Griggs at a work group meeting chaired by Vice-Mayor Gorton. The appellant has respectfully requested that Mr. Griggs recuse himself from today's hearing. Mr. Stumbo stated that neither the Board of Adjustment members nor the Planning staff has the authority to ask Mr. Griggs to recuse himself. He added that Mr. Griggs had prepared a statement to read prior to the start of this hearing.

Mr. Griggs said that, regarding a perceived bias against the appellant, he would like to make the following statement:

> "I have been on this Board for 10 years, appointed to serve by three Mayors. I read the staff reports; I visit the sites; and I listen to all sides. I make my decisions based on the law. I am not a member of the Old Richmond Road Neighborhood Association, or of the Boone Creek Neighborhood Association. I do not listen to lobbyists before a hearing. I live miles away from the subject property, far outside the notification area. I have no direct or indirect financial interest in this case, and I intend to participate."

Mr. Stumbo stated that the Board would first hear the summary of facts from the Planning staff; then the presentation from the appellant; then the presentation from the opponent; and then any public comments. He asked that the Board members hold any questions until all of the presentations were concluded.

He asked that the Board members hold any questions until all of the presentations were concluded.

Staff Presentation: Mr. King stated that, as of January 1, 2012, the title of Zoning Enforcement Officer for Lexington-Fayette County was added to his title of Director of Planning. Prior to that date, that responsibility was handled by the Division of Building Inspection. He said that this appeal is the result of his issuance of a Notice of Violation for the activities at 8291 Old Richmond Road.

Prior to beginning his presentation, Mr. King entered the following into the record: a notebook of materials, including several staff exhibits and materials submitted by the appellant, which was distributed to the Board members and both counsels of record; and a notebook provided by counsel representing several of the neighbors in the area who oppose the appeal.

Mr. King stated that this matter is an appeal of a specific Notice of Violation (NOV) that was issued by the Division of Planning, based upon investigations involving a complaint that was made about activities at 8291 Old Richmond Road. The role of the Zoning Enforcement Officer, as charged by the Zoning Ordinance, is to investigate any complaint, apply the applicable laws, and make a decision as to whether the activity is in compliance with the Ordinance or not. The purpose of this appeal is to determine whether the staff interpreted those rules and laws correctly, and made the appropriate determination.

Mr. King stated that the subject property is located in the extreme southeastern portion of Fayette County, using an aerial photograph to indicate the location. He said that the site is approximately 22 acres in size, and is zoned Agricultural Rural (A-R), a zoning category that encompasses most of the rural area of Fayette County. The A-R zone is regulated under Article 8-1 of the Zoning Ordinance, which includes the list of uses that are allowed within that zoning category. The subject property is also subject to a conditional use permit, which was granted by the Board of Adjustment in 2000.

Referring to an event timeline that was provided to the Board members in the staff exhibits, Mr. King said that, on February 15, 2013, Derek Paulsen, Commissioner of the Department of Planning, Preservation, and Development, received and forwarded to the Division of Planning a complaint packet alleging that a zipline amusement operation had been illegally constructed at the subject property. The staff immediately visited the

site, observed the construction that was ongoing, and noted that an elaborate network of platforms was being constructed, although the wires for the ziplines were not in place at that time. On February 20th, the staff sent a letter to Burgess Carey, who was listed as the owner of the property and associated with Boone Creek Properties, LLC, advising him of the complaint and requesting that he provide information about those activities no later than February 27th. The staff also requested that activities on the properties cease until such time as the staff could make a determination. Mr. King stated that, on February 27th, the staff received a written response from John Park, attorney for Boone Creek Properties, explaining why Mr. Carey did not believe any laws were being violated. The staff took all of that information under advisement, and met again on the site, verifying that the activities on the site had not ceased, but were ongoing, with the ziplines being constructed at about that time. Mr. King noted that he had heard the operation on the subject property referred to as a "canopy tour course," a "zipline," and an "amusement ride." He said, however, that there is no dispute that the facilities are currently in place. Around that same time, the staff also reviewed web-based materials that they deemed to be advertising, inviting the public to come and participate in this facility. Based upon review of all of those facts, the staff issued a Notice of Violation to Boone Creek Properties, LLC, on March 8th, requiring, among other things, that the wire component of the zipline facility be removed within 30 days, which would render it inoperable.

Mr. King said that, following the issuance of the NOV, the appellant contested it, as is his right. Also since that time, the zipline facility was put into operation, and several events have been held there. In addition, other activities have occurred in association with the ziplines, which the staff believes are also violations. The staff considered issuing additional Notices of Violation for those activities, but decided to withhold those until the Board rules on the threshold question, as to whether the facility is a violation of the Zoning Ordinance.

Mr. King stated, with regard to the staff's basis for their decision to issue a NOV, that the Zoning Ordinance says that all lands must be used in compliance with the requirements of the zone in which they are located. There are provisions in each zone for principal permitted, accessory, and conditional uses. Following a great deal of discussion, and review, the staff analyzed the situation to determine whether or not they believed the facility was compliant with the zone, or was in violation. The staff first considered the principal permitted uses in the A-R zone, which are "agriculture," uses as defined under KRS.100, and one single-family residence. Mr. King said that, in the staff's opinion, it was clear that the zipline facility was not an agricultural use, and it was obviously not a single-family house. The staff then considered whether the facility fell within the accessory uses allowable in the A-R zone, which, as defined by KRS.100, are rather broad. The first criterion an accessory use must meet is that it must be "clearly and customarily accessory to a principal use." The staff could not, in good faith, find that this facility was accessory to agriculture; so it also did not comply in that regard. The staff then considered the allowable conditional uses, bearing in mind that this site is subject to an existing conditional use permit, which was granted by the Board of Adjustment. Mr. King stated that, since the appellant did not request a conditional use permit from the Board of Adjustment for this use, the staff reviewed the existing permit, which was issued in 2000. The staff then extensively reviewed the record for the 2000 application for a private anglers'' club, which was approved by the Board of Adjustment, and under which the facility currently operates. The staff considered the application and staff report, the minutes of the hearing, and the Certificate of Land Use Restriction. As is typical for a conditional use permit, the Board included a condition that the use must be operated in agreement with the application and accompanying site plan, as well as the conditions as listed on the Certificate of Land Use Restriction. Mr. King stated that, after a great deal of review and discussion, the staff felt that the zipline facility did not comply with that conditional use permit. The staff does acknowledge that activities in addition to the anglers'' club were allowed by that conditional use permit; there was some discussion at the time of the issuance of the permit about possible environmental education and hiking tours, which were intended to be low-impact and limited to 60 members. Mr. King stated that the staff found nothing in their review of that case that led them to believe that, in 2000, the Board envisioned anything like the existing zipline facility.

Mr. King explained that the staff then considered other factors that might indicate the legality of the Board's intent at the issuance of the conditional use permit. In 2011, an application was filed for a conditional use permit for the subject property and an adjoining property, by a different entity, which included a very large-scale ecotourism operation with an agricultural market, sleeping facilities, and zipline tours. The Board of Adjustment conducted lengthy hearings, over two dates, before denying that request. In reviewing the applications filed in 2000 vs. 2012, zipline facilities were specifically part of the 2012 request, but were not included at all in the 2000 request. Mr. King said that this fact was a clear indicator to the staff of the Board's intentions for the 2000 conditional use permit. The staff felt comfortable, therefore, that a zipline facility was conclusively denied by the Board. Mr. King noted that the staff does not agree with the appellant's contention that, because the 2012 request was larger and was filed by a different entity, it would be allowable to build one small part of that

application based on the 2000 conditional use permit.

Mr. King stated that, at the time of the issuance of the Notice of Violation, the appellant had not yet begun to advertise the zipline facility or hold events there. The appellant has done so subsequently, under the contention that those activities are legal, while the staff contends that they are not. Mr. King said that it is important to note that not a single permit was sought, nor was a single opinion requested as to whether a permit was required, before the construction activity was begun. There has been some discussion as to whether or not a building permit should have been required, but the Building Official reviewed the activities and determined that such a permit would not be necessary. Mr. King noted that, in the staff's opinion, the only way that the facility could be found to be legal would be to determine that all of the new activities are allowable under the existing 2000 conditional use permit for an anglers'' club. He added that, while the appellant contends that the facility is an acceptable accessory and/or conditional use in the agricultural zones, the staff strongly disagrees with that contention.

Mr. King stated that the appellant has made a written statement detailing their disagreement with the staff's position. He requested that the Board allow the staff to address any and all of those points at one time during the rebuttal portion of this hearing.

Appellant's Presentation: Mr. Park began his presentation by requesting that Mr. Griggs' affidavit concerning the recusal request be entered into the record of the hearing. He stated that, although this is his first appearance before the Board of Adjustment, he served two terms on the Greenspace Commission. He said that he is aware, therefore, of the time commitment and responsibilities of these citizen volunteers, and is appreciative of their dedication.

Mr. Park stated that the March 8, 2013, Notice of Violation found the appellant's operation in violation of the existing conditional use permit for the site, since a canopy tour was not discussed during the 2000 permit process. The Division of Planning also contends that the facility is non-compliant due to the membership issue of the private club. Mr. Park said that there was no claim in the NOV that the canopy tour course is having any impact on any neighbors or any other property. In addition, the NOV does not cite any specific provision of the Zoning Ordinance as having been violated; it does not identify the canopy tour as an amusement park use; and it does not claim that the canopy tour was installed without a requisite building permit.

Mr. Park stated that he would present five main points, the first of which is that the canopy tour course, located on the main anglers'' club property, was not part of the much larger 2011 adventure sport and recreation complex for which a conditional use permit was sought. Although a canopy tour was part of that project, it was proposed to be much larger, covering 167 acres. That larger canopy tour was proposed to have camping platforms; overnight lodging; ropes challenge courses; rock climbing; hiking and biking trails; multiple bridges over Boone Creek, including one with foundations sufficient to support an emergency vehicle; a children's activity area; canoe livery; trout hatchery; rappelling; and a farmers' market.

Mr. Park stated that the concerns raised at the time of the 2011 conditional permit request do not apply to the current, much smaller canopy tour proposal. In addition, that proposal was made by a separate legal entity. At the time of the 2011 application, the 2000 conditional use permit was still in effect; the appellant contends that there is no way that the denial of the 2011 application by the Board can have an effect on a permit that was already in existence. Mr. Park said that a recent Kentucky Court of Appeals decision established that rulings of the Board of Adjustment, because it is not a court, do not prevent the Board from changing its mind. The appellant maintains that the appeal before the Board today is a completely different situation than the 2011 application.

Mr. Park said, with regard to his second point, that, since the Board's ruling on the 2011 application, there have been a number of developments at the national, state, and local levels which clarified that a canopy tour is a "recreational use with an educational component." In November of 2011, the U.S. Congress passed an amendment to the Ski Area Permits Act, which is the provision of national law that allows private companies to operate ski resorts on national forest property. This amendment to Federal law, which was passed unanimously by the Senate, allows ski permit holders to offer recreational opportunities in the summer that are nature-based, sustainable, and low-impact. The amendment specifically designated ziplines and ropes challenge courses as included within the nature-based outdoor recreation that will now be permissible on national forest land; it specifically excluded amusement parks, thus recognizing the distinction between the uses. Mr. Park stated that, at the time of the 2011 application for a conditional use permit, there was some

uncertainty about how ziplines would be regulated; some believed that they would be regulated as amusement park rides. He explained that the next pertinent legislation was at the state level, as an amendment to the state Amusement Ride Licensing regulations to specifically exclude canopy tours, ziplines, challenge courses, and tree platforms from the definition of "amusement ride." The state Department of Agriculture found that canopy tours and other similar uses have an educational component that elevates them above the typical amusement ride statute. Mr. Park said that the appellant contends that the perceived state regulations of multiple elements of the 2011 application were the basis of many of the opponents' concerns that the proposed activities would be unregulated amusement park uses. Mr. Park displayed the text published by the Department of Agriculture on the overhead projector, noting that it was passed in the summer of 2012, after the Board's ruling on the 2011 conditional use permit request. He read the following from the ruling:

> "Amusement rides shall not include self or manual blade rappelling equipment; mobile and permanent ziplines; rope courses; canopy tours; tree platforms."

Mr. Park said this development at the state level gave the appellant confidence that a canopy tour was a recreational activity with an educational component.

With regard to the changes at the local level, the appellant learned that there are several existing ziplines in Lexington-Fayette County or the general vicinity, including: Bluegrass Christian Camp, on Athens-Boonesboro Road; the YMCA Bar Y Camp, on Versailles Road; and the Girl Scout Camp on Tates Creek Road, which is located in Jessamine County. In addition, the 2012 LFUCG July 4th festivities included a zipline, which was located downtown on the CentrePointe property. Mr. Park noted that the LFUCG Division of Parks and Recreation contacted the company that installed the Boone Creek Properties canopy tour course and requested a proposal to install a similar course at Raven Run, which is a city-owned nature preserve, as well as a zipline at Camp Kearney. After the controversy that followed the Board's ruling on the 2011 conditional use request, however, the Division of Parks and Recreation dropped their inquiries. Also following the 2011 ruling, the Vice-Mayor appointed a work group to study possible changes to the Zoning Ordinance for agritourism, in order to provide more specificity. That group has worked for more than a year, studying possible agritourism uses and where they might fit within the existing agricultural zoning categories. Mr. Park said that, until those changes are resolved, any ambiguity in the Ordinance must be resolved in favor of the private property owner. As part of their overall recommendations, the agritourism ZOTA work group voted to recommend that canopy tours be allowed in the Kentucky River Palisades area, although a zone change would be required.

Mr. Park stated that Boone Creek Properties has an existing, valid conditional use permit for a private club for outdoor recreation. It was granted in 2000, under Article 8-1(d)(11) of the Zoning Ordinance, which Mr. Park displayed on the overhead projector. That Article lists 28 conditional uses that are permissible for the zone, with the approval of the Board of Adjustment. The conditional use permit was awarded for "commercial and non-commercial outdoor recreational facilities," other examples of which are then listed in the Ordinance. Mr. Park noted that there is nothing in the Ordinance to suggest that, once a conditional use permit has been obtained for an outdoor recreational facility, the permit holder would need to apply for an additional permit if a new recreational activity is added. It is the appellant's contention, therefore, that that requirement cannot be created by implication or interpretation. At the time the 2000 conditional use permit was approved, there was some discussion about adding more recreational uses to the basic use of fishing. Referring to the minutes of that meeting, Mr. Park read the following from the 2000 staff report, in which the staff recommended approval:

> "A private club for outdoor recreation is permitted as a conditional use in the Agricultural Rural zone, with Board of Adjustment approval. The educational component is acceptable and an incidental, subordinate use of the property."

Mr. Park stated that the minutes of the meeting also reflect the discussions at that hearing about activities in addition to fishing, including managed activities such as hiking, environmental education, and wilderness skills seminars. He said that, while the appellant concedes that there is no mention in the minutes of a canopy tour, there is also no provision of the permit that requires that the appellant engage in only a certain few activities. The petitioner contends that, since no such condition was specified, it cannot now be implied, as that could be considered an infringement of private property rights. Mr. Park said that the 2000 meeting minutes also note that the subject property is located in an area recommended in planning documents for recreation and tourism. He displayed an exhibit from the 1996 Comprehensive Plan, which indicated that observation platforms were recommended for the subject property.

Mr. Park stated that the canopy tour course is actually a series of observation platforms in the trees, connected by ziplines, bridges, ladders, or rappel lines. Of the 2.5-hour course, less than three minutes is actually spent on ziplines; most of the tour is spent on the observation platforms, listening to programming in order to learn about the features and wildlife of the Palisades area.

Referring to a comment made by the appellant's attorney in an earlier hearing at this meeting, Mr. Park said that a corollary of *Hamner v. Best* mandates that, because zoning restrictions take away private property rights, they must be strictly construed; they cannot be extended by implication or interpretation; and they must be clear and expressed. If the zoning restrictions are not clear and expressed, the default is to rule in favor of the free exercise of property rights. Mr. Park read the following, from a recent article in *Law Review*:

"In case of ambiguities in the Zoning Ordinance or permit, the tie goes to the landowner."

Mr. Park stated that, since 2000, the anglers'' club has offered a wide range of activities on the subject property, including rappelling and rock climbing. He noted that the site plan submitted as part of the 2000 application process included ropes courses, which are, the appellant contends, clearly analogous to a canopy tour. The appellant also contends that the existing conditional use permit does not specifically address or restrict the types of memberships that the club can offer, including day memberships, and it cannot be interpreted to create such a restriction.

Mr. Park said that it is the appellant's contention that the canopy tour was installed, not only in compliance with the existing conditional use permit, but also with all other existing law. He reiterated that the appellant believes that the operation of the canopy tour is entirely within the law, and it is not intended as an act of defiance of the Board's 2011 decision. Once the state regulations were amended to determine that canopy tours would not be regulated as amusement park rides, the appellant began exploring the amended regulations, and felt that an "outdoor recreational activity with an educational component" perfectly fit the existing conditional use permit. Mr. Park stated that the appellant then met informally with the Planning staff, who "expressed no outrage," although the appellant did not seek a more formal opinion on the proposal. The appellant then confirmed three times with the Division of Building Inspection that the observation platform structures would not require building permits because they were not permanently attached to the ground. Mr. Park noted that no appeal has been brought forward for that action. The appellant met with the Planning staff following the issuance of the Notice of Violation to address issues like parking and conversion of the former Jolly Rogers truck stop (a previously existing non-conforming use) to a welcome center for the subject property. At that time, Mr. Park said, the appellant was advised not to file an application for that conversion, but to await the outcome of this appeal process. The appellant does intend to file such an application in the future, which was the basis for Mr. Park's request for postponement at the beginning of this hearing.

Mr. Park stated that other farms in Lexington-Fayette County currently have tour guides use their property for commercial purposes. The appellant contends that tourism is not an agricultural activity, and believes that those instances raise the issue of selective enforcement.

Mr. Park said that, should the Board reject this appeal, the appellant will continue to work with LFUCG to arrive at some amendment to the existing conditional use permit that would satisfy the Board and make it through the approval process. He reiterated that the appellant does contend, however, that the canopy tours were operating in the spirit of its 2000 conditional use permit. Mr. Park concluded that the appellant reviewed the permits that could possibly be required, and concluded that the facility could be constructed without a building permit or amusement ride license.

Mr. Park added that some of his witnesses had not yet arrived when the witnesses were sworn in earlier in the hearing. Mr. Stumbo swore in those witnesses at this time.

Burgess Carey, appellant, stated that he resides at 8039 Old Richmond Road. He said that he feels blessed to have the responsibility of caring for a section of the lower Boone Creek gorge, and it is his goal to share this little-known resource with the broader community. Mr. Carey first discovered the property in the 1990s, when it was an abandoned gas station and commercial site, with some of Fayette County's most interesting geography and natural features, and he has been trying to find an acceptable sustainable use for it since then. He determined that the property was not appropriate for a single-family dwelling, and was, in fact, more notable for the resources in its back yard than its traditional commercial use in front. In 1999, in an attempt to utilize the

resources of the land to support itself, Mr. Carey thought that trout fishing could provide enough revenue to support the operation and maintenance of a facility that could offer other, seasonal activities that were not traditionally revenue generators. Mr. Carey said that, at the time, he was discouraged by one of the nearby property owners, who is also an opponent of this request. She suggested that he pursue a private club use instead, in order to reduce the trespassing and other issues that had long been a problem for property owners in the area. The result was the creation of Boone Creek Anglers'' Club and Boone Creek Outdoors.

Mr. Carey stated that, since its inception, the club has provided access and environmental education through annual and short-term memberships, as well as guest use, in accordance with the approved conditional use permit. He displayed the following exhibits on the overhead projector: 1) a 2002 activity calendar for the club, noting listed activities such as wildflower walks, photography groups, and a Kentucky Riverkeeper fundraiser; 2) a photograph of a Girl Scout group on a hike on the subject property; 3) a take-out access for canoes using the Boone Creek Whitewater facility; and 4) several photos from the Boone Creek Outdoors section of the club's original website, which was in use from 2000 to 2010.

Mr. Carey said that, since 2000, he has invested and subsidized hundreds of thousands of dollars in the Boone Creek Anglers'' Club, which has never turned a profit. Several years ago, in an attempt to turn Boone Creek Outdoors into his family's primary income source, he purchased a larger, adjoining parcel, which was in decline. A new conditional use permit was required for the new use and expansion of the existing facility; however, Boone Creek Adventures lost their appeal before the Board of Adjustment. Mr. Carey stated that, although he understands many of his opponents' concerns, he believes that the project was misunderstood. Soon after, he set about working with all of the interested parties in hopes of reviving that project, and he will continue those efforts in the future.

Mr. Carey stated that, following the clarification of the "confusing state law" that regulated canopy tours, he believed that the tour use was permitted "by-right" as agritourism. After reviewing the conditional use permit for the fishing club, and meeting informally with the Planning staff, he decided to construct a canopy tour on the 23 acres of property covered under that original permit. In 2012, Mr. Carey and his family moved to an adjoining farm, and they are now more active in the project than ever, as they live and work directly on the property.

Mr. Carey said that Boone Creek Outdoors has always maintained a volunteer program, in order to provide opportunities to individuals without the means to afford a private club membership. As a result of the publicity the recent projects have received, volunteer demand has skyrocketed, and the added manpower has benefitted the property immensely. Mr. Carey stated that the hardwood species along the Palisades are struggling with the presence of several invasive plant species, and one focus of the volunteer program has been removal of those species from the bluffs along the creek. He displayed a photograph of the area before and after the removal of the winter creeper, noting that he believes that the canopy tour facility provides the perfect balance between accessibility and sustainability. Mr. Carey added that he feels that the facility is the perfect addition to the "eco- and agritourism corridor" along Old Richmond Road, which includes a corn maze, goat tower, botanical garden, riding arena, two wineries, a tasting room, and a restaurant.

Mr. Carey proposes to renovate the existing, vacant former gas station at the front of the subject property, if possible, for use as a welcome center for the Boone Creek Outdoors facility. That work would not require an additional access point or septic service, as the building was originally constructed to house a restaurant.

Mr. Carey said that the canopy tour facility has the support of the Boone Creek Neighborhood Association, which was formed last year specifically to address the needs of the properties in the Palisades area around Interstate 75's exit 99. Those properties are heavily impacted by the noise and light pollution from the interstate, as well as frequent trespassers; but the property owners in the area believe they have an opportunity to use small, nonconforming parcels to continue to promote the eco- and agritourism industries in Fayette County. Mr. Carey believes that the canopy tour facility is the perfect use for the subject property, as it is sustainable and it provides educational opportunities for the community. He said that it is also the perfect opportunity for his family to support themselves on the land that they love. For the opponents who have indicated concern for the health of the trees along the canopy tour, Mr. Carey said that Dave Leonard, Consulting Arborist, has inspected the trees and certified that they are healthy. The observation platforms are constructed so that the trees are unharmed and can grow unfettered for up to 30 years without major adjustments. Mr. Carey added that it is in everyone's best interest to improve the health of our remaining forests.

Mr. Carey said that he moved forward with his plans for a canopy tour in good faith, believing that what he was doing was legal and within his rights. He reiterated that he believes that the canopy tour was not part of the larger 2011 adventure, sport, and recreation complex proposed in late 2011; recent legislative cases have clarified that a canopy tour is considered a "nature-based outdoor activity with an educational component," not an amusement ride; Boone Creek Properties has a valid, existing conditional use permit for a private club for outdoor recreation and environmental education; that existing permit does not limit the types of outdoor activities the club can offer, or the types of memberships or guests; Boone Creek Properties installed the canopy tour in compliance with its existing permit and applicable law. Mr. Carey stated that he never intended to alienate so many of his neighbors. He deeply apologized for the controversy this project has caused, and invited all who might be interested to come and take the canopy tour.

Hakan Sebcioglu, General Manager of Boone Creek Outdoors, stated that he has worked in the tourism industry for 20 years, and has launched five zipline adventure courses within the last 10 years. He said that, as General Manager, his primary responsibility is to establish procedures and create a culture that ensures the safety of the natural resources and all of the canopy tour participants.

Mr. Sebcioglu said that he was not familiar with Board of Adjustment procedures, but he was present for the recent report-out of the recreation ZOTA work group, and he realized that there seems to be some confusion about the differences between a zipline and a canopy tour. He stated that a zipline is one element of a challenge course; such typically has several components, including suspended bridges, rappelling, and a guided tour. The entire tour is designed to allow participants to travel from platform to platform among the trees, with trained guides, exploring the forest canopy.

Mr. Sebcioglu stated that the challenge course industry has been dealing with many of these issues for the past several years, particularly in Alaska, where the popularity of canopy tours among cruise ship passengers has skyrocketed. Although many people use the term "zipline" as a catch-all for all challenge courses, canopy tours are actually considered to be nature-based, educational adventures. Mr. Sebcioglu said that canopy tours can provide team-building opportunities and encourage participants to overcome their fear of heights. He added that, since canopy tours and ziplines are still relatively new and unique, there is often a great deal of controversy surrounding them. Mr. Sebcioglu said that one of the best ways to overcome those concerns was to view the facility and participate in a tour in order to form one's own opinion.

Citizen Opposition: Don Todd, attorney, was present representing the Boone Creek Neighborhood Association and the Old Richmond Road Neighborhood Association. He stated that his clients support the staff's recommendations, and they fully understand the scope and purpose of this administrative appeal hearing.

Mr. Todd said that a zipline and canopy tour facility could be a valuable addition to the community, but not on the subject property, and not under the current zoning regulations. He stated that this community has made a tremendous effort over the past 50 years to maintain the county's agricultural area, which is an engine for economic growth and development. Mr. Todd opined that, because the appellant is a developer, he is fully aware of the regulations of the Zoning Ordinance, but he continued to operate the canopy tour in order to generate funds from the property for as long as possible.

Mr. Todd stated that he had provided an exhibit booklet to each Board member, with a thorough itemization of each issue that was presented in the appellant's exhibit packet, with regard to the rule of law and the issuance of the NOV.

Mr. Todd stated that the appellant obtained a conditional use permit 13 years ago for an anglers'' club, after meeting with the adjoining property owners and obtaining their approval of the proposal. At the BOA hearing on that request, the appellant requested two additional cabins, for which the staff recommended disapproval. The conditional use permit was issued for an anglers'' club with 60 members, and nothing else. Since that time, the appellant has expanded the use beyond the scope of that permit, opening the facility to the general public, charging fees, and allowing events and corporate parties. With regard to the 2011 application for a conditional use permit for a larger facility, Mr. Todd said that the reasons for the BOA's disapproval recommendation on that request are the same as this current request: concerns about safety, sanitary sewers, and transportation, among others. Referring to an exhibit depicting the different permits required for construction of a use such as the anglers'' club, he noted that zoning compliance, land disturbance, sign, and ingress/egress permits are required, but the appellant willfully ignored the requirements and went ahead with the project. Mr. Todd said that, in addition, the appellant appeared to ignore the existing contractor's license requirements when his

contracting company performed some of the construction of the canopy tour course.

Mr. Todd distributed copies of prepared findings of fact to the BOA members. Referring to the findings, he said that the BOA had the authority to approve the conditional use permit for the anglers'' club in August of 2000, and that they did so with the conditions of record that were filed along with the minutes of the hearing. One of those conditions limited membership in the private club to 60 people, with the establishment of a required membership list. Another finding notes that no trails, platforms, ziplines or similar uses were depicted on the 2000 site plan, or mentioned in the conditional use application; so they were not approved by the BOA. There was also no provision in that application for daily memberships. Mr. Todd said that another of his findings addresses the fact that no permits were obtained for the construction of the canopy tour platforms. He noted that there is some disagreement with the staff about whether or not the platforms are actually considered structures; but he believes that they are, since they are permanently attached to either the ground or a tree. Mr. Todd added that he would assume that a business owner whose large numbers of customers would be using the platforms to climb at least 30 feet would want to have those structures properly inspected, but it does not appear that the appellant did so. He said that LFUCG "cannot jettison the responsibility" for those inspections, and that the local government has statutory responsibilities to secure the safety of the public, even though the state legislature has more recently determined that ziplines are not amusement rides.

Mr. Todd stated that, on April 11, 2013, the Boone Creek Outdoors website offered canopy tours for a $45 donation. That effort is ongoing, and, in addition, the appellant has opened the course to the public. The most recent post on the website invites the public to take the canopy tours on Saturday, one day after this hearing, for $85. Mr. Todd opined that that advertisement subverts the BOA process as it serves as "further evidence of the appellant's callous disregard for the existing regulations and procedures." He said that his exhibit booklet contains several examples of advertising for the canopy tours, explaining that he was attempting to portray "the evolution of the public persona of the anglers'' club" from a quiet fishing location to a large, profitable operation functioning under the guise of environmental education.

With regard to the concerns about public safety, Mr. Todd said that, since the appellant constructed the canopy tour course without any form of oversight or inspection, the local government could be found liable in the event of an injury. Additionally, any insurance policy that covers the operation will have exclusions that preclude coverage without appropriate vetting and inspection of the site. The insurance company could then deny coverage to anyone who was hurt. Mr. Todd stated that the community is looking to the BOA to make a decision that will provide some protection from such eventualities. He said that the required release that must be signed by zipline participants states that it is an inherently dangerous activity, made more so by the appellant's failure to do due diligence with regard to inspections and permitting. Mr. Todd added that it was on record that the appellant acted to construct the canopy tour "before the Council could take away its right to do so." He believes that, further adding to the safety concerns, the Division of Fire and Emergency Services is completely unaware of the layout of the subject property and the canopy tour course, and the location of any safety equipment.

Mr. Todd said that he had distributed an exhibit detailing possible penalties for the appellant, which provides a menu of the options the Board has, as well as the citations of authorities attached to it. He contends that the BOA has the power to revoke the existing conditional use permit under Article 7-6 of the Zoning Ordinance. The BOA also has the right, under Article 5-8, to fine the appellant anywhere from $10 to $500 per day for their activities; and under Article 5-9(a), the BOA has the ability to order a cessation of the activities on the subject property in the face of a serious threat to the public health, safety, and welfare. If the appellant refuses to remove the equipment following such an order to cease activities, the BOA can have the equipment removed and a lien put on the property to pay for it. Mr. Todd opined that, in the face of the action that the appellant has taken, that is the course of action that the Board should take. He said that, if the BOA votes to disapprove this appeal at this hearing, the appellant can appeal to Circuit Court; the Circuit Judge would then hear arguments and ensure that the record is appropriately documented. LFUCG could then request injunctive relief to prevent any future activity on the site. This part of the process could take up to 60 days to complete. The appellant could also file a complaint to the County Attorney (Larry Roberts), which could result in an additional 30 days' continuance or a jury trial, both of which could extend the process even further, thereby allowing the petitioner to continue to operate in the meantime. Mr. Todd said he believed that the Board should "take affirmative steps under the Ordinance" to require that the petitioner cease and desist and impose a fine. He opined that, if the appellant was truly interested in education, he would have educated himself on the LFUCG processes for construction of the canopy tour course, and followed the requirements accordingly.

Mary Diane Hanna, 6398 Old Richmond Road, stated that she is not against canopy tours and ziplines in general, but she is opposed to the "deceit and disregard for the laws and the people who enforce them." She said that the company that installed the canopy tour equipment is not a registered contractor in Lexington-Fayette County, and they only recently registered with the state government. Ms. Hanna opined that the appellant is using the term "canopy tour" during this hearing because it is more palatable than "zipline," but all of the promotional materials for the facility use "zipline."

Ms. Hanna read the following statement into the record:

> "On Saturday, May 18th, 2013, at 1:13 p.m., three people stopped by Boone Creek Outdoors and talked to a man at the open gate who was receiving people who wanted to go on the ziplines. We said, 'So tell us about the ziplines.' He said, 'It's $45 to do the tour today, and there are four ziplines and a rappelling area. We will have seven ziplines and sky bridges when we are finished, plus the rappelling area. Then it will be $89.' We asked, 'When are you open?' (He answered) 'Right now we're open from 3:00 Friday afternoon and take reservations throughout the weekend.' We asked, 'How long is the longest zipline?' He said, '1,200 feet.' There was no mention of the anglers'' club, joining the club, buying a membership, or providing a donation. It was just a business, like any other, ready to take your money and send you through the courses. The parking lot had about 20 vehicles in it. The people in the car were Mary Diane Hanna, Caroline Francis, and Angie Quigley, who all live in the Old Richmond Road area."

Ms. Hanna also entered as an exhibit an advertisement published by Boone Creek Outdoors, encouraging visitors to be present at this hearing to "fight the BOA."

Citizen Comments: Jane Snyder Herrod, next-door neighbor to the subject property, stated that, at one point, her family's farm surrounded Interstate 75's exit 99. She said that she and her family have been farmers on their land for generations, struggling to make it in a difficult economic climate. Over the years, Ms. Herrod's family has allowed friends, neighbors, and members of the nearby Iroquois Hunt Club to access their property for fishing, hiking, and other outdoor activities.

Ms. Herrod stated that the appellant has been a wonderful neighbor since the inception of the anglers'' club in 2000. She said that it appears that the conditional use permit is in place and does not specifically exclude the canopy tour use, so that should be sufficient. Ms. Herrod served on the Governor's Board for forestry management, she noted, so she is aware that forestry is an allowable use in the agricultural zones. She believes that canopy tours are "a wonderful accessory to forestry," and are preferable to clear-cutting, which is also accessory to agriculture. Ms. Herrod added that she believes that the environmental education provided by the appellant's operation is invaluable, particularly to children, who need to have the opportunity to experience natural areas.

Ms. Herrod said that the greatest threat to the Boone Creek corridor is invasive plant species; and, without a funding mechanism in place, most property owners cannot afford to hire the labor to clear out those invasive species among the steep and rocky terrain. She stated that property owners in the area are typically expected to use their property only for farming; but doing so is very difficult due to the extreme topography of the area, including steep slopes, cliffs, and the creek. Referring to a topographic map of the subject property, she noted the many cliff areas, indicating that it would be nearly impossible for the appellant to conduct a farming operation on the property.

Ms. Herrod read the following definition of agritourism, which was approved in 2012:

> "These activities shall be integrated into, directly associated with, and incidental and subordinate to the principal agricultural production on the property."

Ms. Herrod said that her family has lived on the adjoining property since 1804; and, during that time, the subject property has been used for: a toll booth; several different restaurants, some of which had liquor licenses; a house of prostitution; and a gas station. She opined that a property owner has the right to make money with their property. In addition, the construction of the nearby interstate exchange also heavily impacts the subject and surrounding properties, further undermining the possibility of pursuing a true agricultural use on the property. Ms. Herrod believes that the appellant is pursuing the best use for the property; and, as the owner

of the downstream property along Boone Creek, she appreciates those efforts. She opined that the appellant has not done anything wrong with his property, and she is glad to have a fresh, exciting approach to nature education in the area, particularly since "not everyone can afford horses." Ms. Herrod added, with regard to Mr. Todd's comments about the canopy tour being a threat to public health, that tobacco farming is a major threat to the public health as well.

Bill Rouse, longtime member of Boone Creek Anglers'' Club, stated that he has no financial interest in this enterprise. He said that he first fell in love with Boone Creek as a child, when his father was a member and onetime president of the Iroquois Hunt Club. Mr. Rouse stated that he and his sons are fly fishermen, and his favorite part of the activity is enjoying the beauty of the various places he visits; Boone Creek is one of those places. He and his family have had family reunions at the anglers'' club, where they have been dues-paying members for 10 years.

With regard to the canopy tour course, Mr. Rouse stated that he supports the enterprise, which, he believes, is firmly nature-oriented and educational. He said that he would not support any endeavor in the area which could potentially endanger the fishing in Boone Creek, because he believes that it is "the prettiest corner of Fayette County." Mr. Rouse opined that there should be a way for that beauty to be shared with the public, in a limited scope, and in a non-invasive and eco-friendly way with a strong emphasis on preservation. He believes that the canopy tours meet all of those qualities.

Mr. Rouse stated that, this past Memorial Day, he was fishing in Boone Creek when several patrons of the zipline passed overhead. He said that he barely noticed them, and he does not believe that the canopy tour has a negative impact on the creek area at all.

Mr. Rouse said that, through his work with various charity organizations, he has often encountered individuals with a "this needs to be done, but not near me" attitude, and he believes that this is one of those situations. He noted that he believes that it takes strong leaders, making strong decisions, to determine what is best for a whole community, not "just a select few who have deep pockets." Mr. Rouse stated that the taxpayers of Lexington-Fayette County have paid millions of dollars to preserve thousands of acres of agricultural land, most of which they will never have the opportunity to see. He opined that they should be allowed to see Boone Creek via the Boone Creek Outdoors facility.

Alex Martin, 7121 Grimes Mill Road, stated that he has also invited friends and family members to fish, hike, and hunt along Boone Creek. He said, with regard to the appellant's statements about stocking Boone Creek, that, for some time, it was stocked through a state program. The program was discontinued, however, due to neighbors' concerns about trespassers and trash in the creek. Mr. Martin stated that guests on his property have been asked by users of the anglers'' club if they had a right to be there, even though they were not on the appellant's property. He noted that one of the appellant's photo exhibits depicted people trespassing on his property.

Mr. Martin stated that state laws that govern hunting and fishing are very different from those that govern kayaking and boating. Hunting and fishing laws are very specific about the use of navigable waterways, and Mr. Martin believes that the members of the anglers'' club are not using Boone Creek in accordance with those laws. He added that signs advising against trespassing are not required to be posted; the members of the anglers'' club are expected to know where the property lines are, and stay within them, whether signs are posted or not.

Mr. Martin stated that, some years ago, he appealed to the BOA for a conditional use permit for a bed & breakfast facility; Mr. Park also has such a permit. Mr. Martin does not believe that the lodge on the appellant's property is lawful, since the subject property is within 1.5 miles of Mr. Park's bed & breakfast, and there are regulations prohibiting the location of two such uses within two miles in the agricultural zones. He added that his conditional use permit for a bed & breakfast use was very specific, and it required paving, fire alarm systems, and other improvements to his property. Mr. Martin stated that he does not understand how the canopy tour course could be constructed without permits, when his property was placed under such intense scrutiny.

Mr. Martin said that, at a recent dinner at Riptides restaurant, he overheard some of the appellant's contractors and employees discussing the work on the subject property. One of the speakers indicated that he did not care what the appellant wanted to happen, and Mr. Martin found this disconcerting, since the appellant was not

present. He was also concerned when he overheard some possible future plans for the subject property.

Van Meter Pettit, 155 Constitution Street, stated that laws and regulations are intended to keep the public safe and allow the Bluegrass region to be "the envy of the world." He said that he believes that this argument is unnecessary, opining that, because the canopy tour course is new to this area, people are afraid of it and "think that it's going to be a menace." Mr. Pettit said that he believes that everyone involved in this issue should take the canopy tour and decide for themselves whether it safe and properly operated and maintained.

Mr. Pettit stated that, when he has out-of-town guests whom he takes to visit his favorite sites in Kentucky, Boone Creek Outdoors is at the top of the list. He said that he would be on the other side of the fence on this issue if he felt that the facility had not been done tastefully and with great care and affection for the land. Mr. Pettit stated that he could not speak to the procedural concerns that have been raised, but he believes that, if the facility is allowed to proceed with their activities, it will be looked back upon with the same type of reverence that people have for Keeneland and Shakertown. He asked that the Board members use a bit of reserve, and ask themselves if the canopy tour course "is truly creating harm," since he believes that it could have an enormous potential benefit for Fayette County.

Melissa King, a resident of the Ashley Woods neighborhood, stated that she had recently received an email from Chelsea Perrin of Boone Creek Outdoors asking her to attend this hearing in support of this issue, and to sign their petition. She stated that there was no mention in the email of dues or membership requirements.

Ms. King said that, if the appellant truly believed that the 2000 conditional use permit was sufficient to permit ziplines, he would not have felt the need to apply for specific approval of it in 2011. She stated that she is not opposed to the preservation of Boone Creek; but she believes that, if the appellant wants to offer canopy tours, he should either do so in an area zoned for that use, or obtain the appropriate permits.

Joan Mayer, a resident of Clark County, stated that her family's farm includes miles of Boone Creek shoreline along both sides of the creek. She said that, although the canopy tour sounds like fun, she is concerned about the future of the property and the surrounding area. Ms. Mayer stated that Clark County does not have sufficient zoning regulations to protect her property, and she counts on Lexington-Fayette County to protect her property and livestock from trespassers and thieves. In addition, she is concerned that her property will eventually be "surrounded by cabins."

Mike Levy, member of the Boone Creek Anglers'' Club, stated that he has been a dues-paying member of the club for 10 years. He said that he has used the property for many family outings, and his children learned fly-fishing there in Boone Creek.

Mr. Levy stated that he was hesitant when the canopy tour idea was first presented; but he was assured by management that it would be constructed to be non-invasive, and would provide additional amenities to club members. He said that he recently participated in the tour, and the scenery and level of safety were comparable to the other such tours he has taken in various locations around the world. In addition, the guides provided a wealth of information about the history of the area and the wildlife they would encounter on the tour.

Mr. Levy stated that he has lived in Lexington for over 20 years, and he travels extensively for his business; he has been fortunate to experience many different cities and their various attractions. He said that, in his opinion, Lexington is lacking in outdoor family experiences, and Boone Creek Adventures can provide those activities while educating children about the outdoors and the environment. In addition, he and his wife operate a Thoroughbred farm and allow visitors to their property so that they can share in the beauty of the equine industry in Central Kentucky. They are members of the PDR program, and support the protection of agricultural properties; but, Mr. Levy said, he hopes those types of laws do not stifle the ability of children and families to enjoy a two-hour educational experience that, he believes, is much more valuable than sharing popcorn and a movie.

Linda Carey, 1616 Tates Creek Road, stated that she is the appellant's mother. She said that she served on the Lexington Center Board for 12 years, so she is somewhat familiar with the political process. Ms. Carey stated that she has watched this process since the appellant purchased the subject property with his savings 17 years ago, and his main goal as a passionate outdoorsman has always been to make the property accessible to the public. She opined that Gloria and Charles Martin, Fayette Alliance, and their "phalanx of lawyers" have been the "actors in a play that has been ludicrous, malicious, and Machiavellian," in trying to

shut down the Boone Creek Anglers'' Club "because they want no one on Boone Creek." Ms. Carey stated that the BOA has the power to permit or take away the appellant's dream of preserving Boone Creek and the gorge, and making it accessible to the public.

With regard to the safety concerns expressed by Mr. Todd, Ms. Carey said that, at 71 years old, she had recently completed the full canopy tour, and she loved it. She stated that, with two artificial hips, and four screws in her back, she had no concerns for her safety whatsoever; and, she was able to see the property in a way that she would never have been able to on the ground, due to her inability to navigate the steep terrain. Ms. Carey stated that the appellant did not intend to be devious, callous, or disrespectful of the BOA or any other body. She added that, when the appellant met with the Planning staff in 2011, they recommended approval.

Erin Rouse, member of the Boone Creek Anglers'' Club, stated that she is a minister in the Presbyterian Church. She said that she and her husband have been supportive of Burnham Wood, their presbytery's camp ministry, because they believe that "being out in creation touches people spiritually, and helps them to get right again, gain perspective, and find some much-needed peace." Ms. Rouse stated that, in her church, she is called to be a good steward of the earth; but she believes that it is difficult to take care of something if one is not familiar with it. She said that people who live in the city do not often get opportunities to interact with nature, but those opportunities are available at Boone Creek Outdoors.

Ms. Rouse stated that, while she has many friends in the house industry and appreciates Lexington-Fayette County's traditions in that area, she believes that "we are not just a county of horse farms," and a few voices should not be able to prevent the citizens from engaging with nature. She believes, therefore, that the appellant is a visionary who should be applauded, not "condemned and vilified," which she finds offensive. Ms. Rouse added that the appellant is trying to share his land, unlike others who live in the vicinity, who wish to keep it to themselves.

Ms. Rouse said that she also recently took the canopy tour, although she has some fear of heights. She stated that, once the tour was over, her fear of heights was gone, and she had enjoyed herself and gained some confidence. She asked that the Board members not "succumb to the voices of the few who are afraid," or the few who want to keep the land for themselves. Ms. Rouse stated that she believes that the appellant's efforts should be celebrated, rather than condemned. She concluded by entering into the record a letter of support from a group of Louisville residents.

Martha Jenkins, former BOA member, stated that she was on the Board in 2000, when this propery was originally reviewed. She said that, at that time, the appellant requested an administrative review, a variance, and a conditional use. A conditional use permit was granted for a private anglers'' club, with a stated membership, dues, and a member list. Ms. Jenkins said that she has a great deal of sympathy for the passion displayed by the appellant's supporters; but, in her opinion, the appellant's use of the property has gone far beyond what was granted by the BOA in 2000. She added that that should be the focus of the Board's decision today.

Jim Lurton, Turner Station Road, 7098 Turner Station Road, stated that he believes that the 2000 conditional use permit has been "grossly abused." He said that he and some of the other opponents fought against the appellant's 2011 request as well, and they were pleased when it was disapproved. Mr. Lurton said that the appellant then "poked his finger in everybody's eye," by constructing the canopy tour without first obtaining any of the required permits, and he thought that the purpose of this hearing was to determine the remedy for that.

Dr. Charles Martin, 7416 Grimes Mill Road, stated that the appellant's 1,600 feet of frontage on Boone Creek does not provide adequate space for fly fishing, so the fishing activities naturally expand up and down the creek. He said that members of the club have fished, ridden horses, hiked, and hunted on his property for years, with and without permission, and he has never asked anyone to leave.

Dr. Martin stated that his opposition to this request is not about the zipline, and he is not trying to stop anyone from enjoying nature. He said that the purpose of this hearing is to determine if the appellant has followed the rules and regulations that are in place.

Dr. Martin stated that the ongoing battle over the activities on the subject property has had a negative effect on the community, due partly to a social media campaign that ridicules those who are opposed to the appellant's

operation. He concluded by opining that the other purpose of this hearing is to determine what can be done to stop the continued profit-taking from an illegal operation.

Bill Meade, 9086 Old Richmond Road, stated that he had discussed the appellant's plans for the subject property at the beginning of this project. He informed the appellant at that time that he would support the operation, as long as the appellant kept his word. Mr. Meade stated that he loves Boone Creek and the Palisades, and he believes that there is no place in the world more beautiful or deserving of the respect that the appellant has given it.

Mr. Meade said that he came before the BOA several years ago for a conditional use permit. At that hearing, one person spoke in opposition; when asked why they were opposed, that individual responded, "Because I can." Mr. Meade stated that he believes that some of the opponents of this project are opposed just because they can be, without a good reason.

Callie Ricketts, 8705 Durbin Lane, stated that she lives very near the subject property, and has lived in the general vicinity her whole life. She said that, although she has spent her entire life in the area, she has never had access to Boone Creek or the gorge. Since she is now employed by Boone Creek Outdoors, Ms. Ricketts stated that she has had the opportunity to see the property, and she believes that she is better for it.

Ms. Ricketts said that Boone Creek Outdoors is extremely motivated to preserve and maintain the subject property and surrounding area, because promotion of the outdoors is the main purpose of the facility. She said that she has participated in the removal of invasive species from the property.

Ms. Ricketts stated that educational information is provided throughout the canopy tour. She added that the tours are completely safe; the staff is fully trained in safety procedures, and the course was constructed to minimize risk as much as possible. Ms. Ricketts stated that she fully supports this project, and she does not see any reason why it should not be allowed to continue.

Sarah Steele, 397 Peachtree Drive, stated that she believes in the cause of Boone Creek Outdoors. She said that Kentucky is her home, she loves the land, and she is proud of it. She noted that working for Boone Creek Outdoors is the first job she has had that she is able to support wholeheartedly, because she gets to educate people about a beautiful place, while encouraging them to overcome their fears.

Ms. Steele stated, with regard to the concerns raised about the safety of the canopy tour, that there are inherent risks associated with the project, but she believes that participating in the tour is safer than driving a car on the interstate. She said that the guides are thoroughly trained to keep participants safe and educate them about the ecology of the area.

Ms. Steele said that it appears that the main issue in this case is that the subject property is zoned for agricultural use. She explained that the property is too steep for farming or raising horses or cattle, so it would not be appropriate for agricultural use. Ms. Steele believes that the petitioner is making the best use of the property, and that he should be allowed to continue. She asked the BOA help the petitioner to comply with the regulations, so that Boone Creek Outdoors can continue their work as good stewards of the land.

Petitioner Rebuttal: Mr. Park stated that Mr. Todd used the "kitchen sink approach" in his presentation, failing to limit his remarks to the Notice of Violation and making unsupported allegations.

With regard to the question of permits, Mr. Park displayed an exhibit map from the 2000 conditional use permit hearing for Boone Creek Properties. He said that the first activity listed was, "manage activities such as hiking, environmental education, and wilderness skills seminars." Although that statement is very general, the petitioner contends that the canopy tour is a managed activity similar to hiking and biking. Mr. Park stated that there have been two court decisions since the BOA's 2012 denial of the Boone Creek Adventures application. Both of those courts have reached the ruling that a canopy tour is an outdoor, nature-based recreational activity akin to hiking and biking trails. The primary difference, Mr. Park opined, is that a canopy tour can provide opportunities for those who might not be physically able to hike, such as Ms. Carey, or a wheelchair-bound individual who recently participated in the tour.

Mr. Park read the following from the 1996 Comprehensive Plan, which was presented at the 2000 BOA hearing:

> "The Plan envisions increased tourism and recreation in this area. Increased public recreation will build public support for a rural greenspace plan."

Mr. Park stated that the petitioner contends that the Boone Creek Outdoors project will continue to build support for preserving green space by increasing public awareness of the problems it is facing. He read the following from Rathkopf's *The Law of Zoning and Planning*:

> "In accordance with the interpretive principle that, since zoning restrictions are in derogation of a common law, they should be strictly construed in favor of the free use of land. Courts generally have construed the terms 'club' and clubhouse' in zoning ordinances in a very broad fashion, allowing all manner of uses and activities to fall within their scope."

And the following, specifically addressing clubs for recreation:

> "All manner of recreational activities and facilities, unless otherwise expressly provided for by an ordinance, may well be allowed under the term 'club' as used in the zoning ordinance."

Mr. Park stated that it is the petitioner's contention that, because the definition of "club" can include managed recreational activities and guided hikes, the canopy tour of the forest is consistent with the uses allowed under the 2000 conditional use permit. He added that, if the issue is ambiguous, the "tie" should go to the landowner.

Mr. Park stated that Mr. Todd mentioned many issues that were not covered by the NOV, and he believes that it "poisons the record." With regard to Mr. Todd's comment about the appellant's failure to obtain a grading permit, he said that there was no grading done on the property; it had an existing, paved parking lot when the appellant purchased it. Mr. Park stated that Carey Technologies, which performed the general contracting on the project, is owned by the appellant and is a registered contractor in Lexington-Fayette County. He noted, however, that there was no mention of those issues in the NOV, the addressing of which is the purpose of this hearing. Mr. Park added that the appellant had provided a barbecue lunch on the subject property as a thank-you for volunteers who collected trash from the roadside in the area. He said, with regard to Mr. Todd's comments about the number of club members allowed, that the appellant has stayed within the 60-guest limit, including fishing club members, their guests, and those participating in the canopy tour; each participant in the tour must sign a form recognizing them as a "day member" of the club. Mr. Park stated that it is not possible for Mr. Todd to base a finding of fact on the safety concerns of the canopy tour facility, because safety was not mentioned in the NOV. He explained that the course has been inspected by a certified third party, and a fire safety plan has been updated and filed with the Division of Fire and Emergency Services. Mr. Park added that many of the firefighters from the nearby firehouse are "some of the facility's biggest fans." Again with regard to the safety concerns, Mr. Park stated that riding a horse is much less safe; but there is no intent to shut down Keeneland or the Iroquois Hunt Club. Mr. Park stated, with regard to Mr. Todd's comments about the waiver required of each participant in the canopy tour, that such items are drafted by lawyers to be broad and inclusive, or they will not function as intended. Therefore, all of the language about threats is necessary to make the request function well as legal documents.

Mr. Park stated that there had been "a great amount of hand-wringing about following rules and procedures," and he felt that the BOA members should know that many of the photos submitted by opponents as part of a written complaint were taken while trespassing on the appellant's property, so the photographers apparently were not concerned about his property rights.

Mr. Park said that he shares Dr. Martin's concerns about the animosity that has been generated by this request. He opined that, although the animosity generated by this issue is regrettable and unfortunate, Mr. Todd has contributed to the negativity. Mr. Park stated that the fact that some people do not like the appellant or his project is not a sufficient basis for a violation. He said that, with so much competing testimony, there is no way that the BOA members can adequately judge the facility without seeing it for themselves. Mr. Park recently participated in a canopy tour, and he said he found it to be an amazing experience and asset. He asked that the Board not take that away from the community.

Staff Rebuttal: Mr. King stated, with regard to Mr. Park's assertion that the NOV did not allege that activities on the subject property are having or have had any adverse impact on surrounding properties, that there is no requirement in the Zoning Ordinance or state statute that a NOV must make such allegation; the use either

complies with the law, or it does not.

Mr. King said that Mr. Park's statement that the NOV did not cite any specific sections of the Zoning Ordinance was simply untrue. The NOV cited sections of Article 8, that govern the control of uses, just as he explained in his initial presentation that detailed the staff's process in determining whether the issue that they were asked to investigate was, in fact, a violation of the Zoning Ordinance.

With regard to the discussion about whether the canopy tour is an amusement or recreational activity, Mr. King stated that nothing in the staff's analysis or the NOV addressed that issue one way or another. He added that, if it is in fact a recreational activity with an educational component as said, the staff's contention was that it did not comply with the 2000 conditional use permit. The 2000 conditional use permit did, in fact, have specific restrictions and conditions placed on it by the Board, including that it had to operate in accordance with the submitted application, and the site plan. The staff has reviewed the file, and, Mr. King emphasized, found no site plan that depicted a rope course. The site plan that was before the BOA, which was included in the staff's exhibits, did not include any of the extensive facilities that have been constructed, or the designated parking areas, which led the staff to conclude that the facility does not comply with the terms that the Board placed on the conditional use permit. Mr. King said that the staff's review of the 2011 case did contribute to their opinion, but he never indicated that that was the determining factor as to whether the zipline was something that was covered under the Board's conditional use permit from 2000. The zipline was a part of the 2011 application, with a different applicant and additional activities, but the Board disapproved that case. Mr. King said that the fact that the zipline was part of a larger application does not make in acceptable, in the staff's opinion, to construct a smaller version of it. He reiterated that the staff considered what types of facilities were contemplated in the 2000 and 2011 applications, and how that applies to the staff's review of whether or not the use that is occurring there is in violation of the Zoning Ordinance.

Mr. King said that the staff had entered two items in the record at the beginning of the hearing, that should have been noted at that time: one, a statement from Fayette Alliance; and two, an email from Susan Booker. Both items were distributed to the Board members at the start of the hearing.

Mr. King stated that the staff understands and acknowledges that there are plans that refer to the subject property, and community goals and environmental stewardship issues that have all been discussed. In the end, however, this case is about the law: what the laws say, and what the laws charge in this case. Mr. King said that it has been alluded to in this hearing that the staff supported the 2011 application; the BOA, however, disapproved it. Therefore, the staff is now in the role of the enforcement agency. Mr. King stated that the staff considered this case very closely, and, in the end, determined that, under the charge of the statute and Zoning Ordinance, this activity was in violation of the Zoning Ordinance.

Note: Chairman Stumbo declared a brief recess at 5.49 p.m. The meeting reconvened at 6:03 p.m. with the same members in attendance.

Board Questions: Ms. Meyer asked if the appellant could have come to the staff at any time to revise his existing conditional use permit. Mr. King answered that the staff did indicate in the Notice of Violation that one of possible avenues of relief would be to seek a revision of the conditional use permit that was granted in 2000 to expressly allow and regulate the use, determine membership terms, regulate the parking, etc. He explained that there was a problem with that, however, because of the 2011 case, which is still active. That case was disapproved by the Board and is currently under litigation. The staff has always been advised that it is not possible to have two active applications at one time on the same piece of property. Mr. King said that the staff decided, and indicated on the NOV, that, if that avenue was approached, there would have to be consultations between all of the attorneys involved to determine if there was a way to work around that restriction.

Ms. Meyer asked if the appellant would need to withdraw the existing court case in order to request an amendment to the 2000 conditional use permit. Mr. King responded that he was not sure if the case would need to be withdrawn, although that course of action has been taken in similar cases in the past. In at least one case, however, an agreement was presented before the court to allow two different proceedings going on concurrently on the same piece of property.

Petitioner Question: Mr. Park asked, with regard to Mr. King's remark that, because the 2011 case was disapproved, the staff thought that the zipline was not permissible under the 2000 permit, and if that also referred to the rappelling, hiking, biking, and other portions of the 2011 appeal that was disapproved. Mr. King

answered that he said that it was one of the indicators the staff used in determining the appropriateness of the zipline. He noted that the staff was not asked to consider any of the other activities at this point, and noted that he was not comfortable addressing that level of detail "on the fly" in this hearing, and added that that conversation could have taken place at some point; but, as the Zoning Administrator, he was not comfortable making that determination at this hearing. Mr. King added that, in cases such as this, the staff looks at the issues deeply and considers a lot of different aspects before they make a ruling.

Mr. Park stated, with regard to Ms. Meyer's question, that the appellant understands that the Board has discretion to consider a new application for the same piece of property if it is part of a different project with a different property owner and the circumstances have changed. He added that there is also an option called an "unconstitutional condition doctrine," in which the government conditions one right on the surrender of another right, which is unconstitutional. Mr. Park said that, in this case, in order for the appellant to make an application for an amendment to his conditional use permit, a separate company, affecting the Snyder family and other appellants in the 2011 case, would have to give up their rights. The appellant does not believe that is fair, and wants to appeal to the Board to amend the conditional use permit and address all of the issues that would go along with it.

Chairman Comment: Mr. Stumbo stated that the public hearing was concluded, and he would entertain discussion or a motion.

Board Comments: Ms. Meyer stated that there is a lot of passion on both sides of this issue; and, having served on the recreation ZOTA committee, she understands the difficulty of this case. She added that she is well aware of what is involved, and the possible long-term effects of the decisions that will be made. Ms. Meyer said that she appreciates the appellant's work on the project and his passion for the land; she also appreciates the young employees who came to speak, and who are engaged in learning about the history and nature of the area. She believes, however, that the broader issue in this case is that there are statutes, and a Zoning Ordinance, and rules that must be abided by. There are also "lawyerly" issues that need to be addressed in this case, with long-term ramifications that could occur if the issues are not addressed. Ms. Meyer stated that a great deal of time and effort has been invested in the Zoning Ordinance, and that investment is at the root of this case. She said that the appellant likely knew, when he bought the property, that it was not suitable for typical agriculture; he came before the Board and requested a conditional use permit for an anglers'' club. That request was approved, along with some associated uses. Ms. Meyer said that she cannot speak for the BOA in 2000; but, having read the staff reports, minutes, and other items from the hearings, "everyone thought that the anglers'' club was going to happen." She added that, with continued efforts on the part of the appellant and the work on the recreation ZOTA, she hopes that this issue can be resolved in a way that makes it more transparent and well-defined. Ms. Meyer concluded that the appellant has a long way to go, but she would like to see all parties reach some consensus and resolve those issues.

Motion: A motion was made by Ms. Meyer, seconded by Mr. Smith, and carried unanimously (Glover, Moore, and White absent) to disapprove **A-2013-26: BOONE CREEK ADVENTURES** - an appeal of a Notice of Violation (NOV) issued by the Division of Planning on March 8, 2013 for a property in the Agricultural Rural (A-R) zone, at 8291 Old Richmond Road, based on the following findings of fact:

FINDINGS OF FACT

A conditional use permit for 8291 Old Richmond Road was issued in 2000, based on a site plan, application, and specific conditions, placed by the Board of Adjustment for a private anglers'' club, which was a conditional use, not a permitted or accessory use. Canopy tours utilizing ziplines were not included in this 2000 conditional use permit application or site plan, and not granted as part of the conditional use permit. The granting of the conditional use permit in 2000 was not issued to permit this type of use, as stated by the BOA member at the time the permit was issued in 2000.

Chairman Comment: Mr. Stumbo stated that, in hearing all of the testimony at this hearing and the 2012 hearing, he believes that the appellant's project is incredible. He said that this was a very difficult and unpopular decision for the Board to make; but he believes that a very dangerous precedent was set by the appellant violating and ignoring the decision of the Board of Adjustment, as well as the Notice of Violation that was issued by the Division of Planning. Mr. Stumbo said that he would like to see this situation rectified, particularly since the work of the recreation ZOTA committee could help to resolve the issues; but he believes that, had the Board granted this appeal, it could have paved the way for others to pursue the same

course of action. He added that both the petitioner and the opposition made eloquent presentations; but sometimes the BOA members are called upon to make difficult decisions, and this was one of those times. Mr. Stumbo said that he wishes the appellant well, and this hearing was now concluded.

Opposition Comments: Mr. Todd asked if the BOA intended to address the issue of cessation. Mr. Stumbo said that he would like to authorize the Law Department to investigate what type of action might be appropriate in this instance. Mr. Todd asked if the Board intended to impose a timeframe on that investigation, since there could be serious ramifications if the petitioner's facility is allowed to continue to operate. Mr. Stumbo referred that question to Ms. Jones, who responded that there are several different types of options, including civil penalties and court actions. Ms. Jones replied that the appellant's right to appeal and right to correct the violation covered under the NOV must also be considered. Mr. Todd stated that, based on their finding, the Board had the authority to indicate what action they would take, including abatement. He said that, if there is no action taken at this point to force the appellant to cease and desist, he will continue to operate as he has since the issuance of the NOV. Mr. Todd opined that that would not send a good message to the general public, and noted that there must be "an end of the line" with regard to consequences, and he would expect the BOA to take steps in that regard.

Mr. Stumbo asked if the BOA had the right to request that the appellant cease and desist his operation. Ms. Jones answered that the Board does have that right, but there are certain court procedures that must be followed to accomplish that. Ms. Meyer asked how long that process would take. Ms. Jones responded that that would depend on which course of action the BOA chooses to take, since any option would need to be reviewed by the Department of Law. Mr. Stumbo asked if that would be the process if the BOA chose to request that the appellant cease and desist. Ms. Jones answered that the Board does not have the authority to issue an injunction. Mr. Stumbo asked if the BOA did indeed have the authority to request that the appellant cease and desist, to which Ms. Jones responded that they did.

Mr. Todd stated that the BOA also has the right to pursue penalties; and, in the instance where the continuation of the violation would pose a substantial risk of injury or to the public health, the BOA has the right to order an abatement. He said that timeframe is important.

Mr. Park stated that he had some misunderstanding with regard to the change of Zoning Enforcement duties to the Division of Planning, and he looked forward to communicating with Ms. Jones.

Mr. Stumbo said that, according to Ms. Jones, The Board does have the right to pursue penalties. He hoped that, by the Board's next meeting, whatever actions that can be taken can be explored.

Mr. Todd asked that Zoning Enforcement staff inspect the site; and, if operations are found to be ongoing, asked that the Board pursue their options in an accelerated fashion.

Mr. Stumbo asked, with regard to enforcement, what guidelines or limitations are in place. Mr. King answered that, given all the ongoing legal machinations, this situation is complicated. He said that, from the staff's standpoint, the Division of Planning is committed to working with the Department of Law to press forward in every way possible to attain compliance "on the ground." He added that the appellant has the right to challenge the Board's decision at this hearing in court, within 30 days.

Mr. Stumbo asked if the BOA members had a preference with regard to their next actions. Ms. Meyer stated that, since the Board denied the appeal, the appellant would understand that the canopy tour needs to cease and desist, since that is the crux of this issue. She added that she would also like for the appellant to work with LFUCG to achieve some type of resolution. Ms. Meyer said that Mr. King indicated that the staff would go forward aggressively to achieve compliance, so she would like to see a report of those efforts at the Board's June meeting.

Mr. Griggs asked if the appellant intended to operate the zipline after this hearing. Mr. Park advised that his client not answer that question until they had an opportunity to discuss it.

Mr. Stumbo asked if the Board would like to make a motion for the appellant to cease and desist at this point, or if the staff and the Law Department should investigate the options and report at the June meeting. Ms. Meyer asked if the Board has the ability to request that the appellant cease and desist. Ms. Jones responded that, according to the Ordinance, unless the violation poses a serious threat to public health,

safety, or welfare, the Law Department has to go through the proper legal processes to accomplish that if the party is unwilling to comply of their own free will. She said that she was not sure if enough evidence had been presented to indicate that need, and it would need to be evaluated. Ms. Jones noted that there are also other avenues that could be pursued by the Zoning Enforcement Officer, including civil penalties, but she does not believe that the Board has the authority to order the appellant to cease without going through the proper legal process.

Mr. Marx stated that the Board could express their intent with regard to the staff's course of action, but they would then need to allow time for the staff to assess the best option.

Mr. Stumbo stated that it appeared that the Board had reached a consensus to request that the Law Department research options and recommend a course of action at the June meeting.

IV. **BOARD ITEMS** – No such items were presented.

V. **STAFF ITEMS** - House Bill 55 Training Opportunities – Mr. Sallee stated that an APA audio conference would be held in the Division of Planning conference room on Wednesday, June 5, from 4:00 until 5:30 p.m. The title of this audio conference is "Pedestrian and Bicycle Planning." A second audio conference, "Planning Law Review," would be held on Wednesday, June 26, from 4:00 until 5:30 p.m., also in the Division of Planning conference room. Each audio conference will provide 1.5 hours of required training for Planning Commission and Board of Adjustment members, as well as staff.

VI. **NEXT MEETING DATE** - The Chair announced that the next meeting date would be June 28, 2013.

VII. **ADJOURNMENT** – There being no further business, the Chair declared the meeting adjourned at 6:29 p.m.

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Barry Stumbo, Chair

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James Griggs, Secretary